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# IN THE
# SUPREME COURT OF THE UNITED STATES

TERRY L. STEWART, et al.,
PETITIONERS,

-vs-

DONALD EDWARD BEATY,
RESPONDENT.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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**CAPITAL CASE**

## QUESTIONS PRESENTED FOR REVIEW

Nearly 20 years ago, Donald Beaty sexually assaulted and murdered 13-year-old Christy Ann Fornoff while she was making collections for her newspaper route. This case presents two questions:

1. Where the state supreme court found that the defendant's confession to the doctor was spontaneous, and every reviewing court, including the Ninth Circuit, has found that the doctor neither questioned the defendant nor engaged in the functional equivalent of questioning, does the Fifth Amendment require an evidentiary hearing to determine whether the defendant's spontaneous confession was voluntary?

2. Did the Ninth Circuit err by finding that the state trial court limited the scope of an evidentiary hearing when the defendant never argued such a limitation in the state or federal courts?

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## OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 303 F.3d 975 (9th Cir. 2002), and is included as Appendix A. The unpublished order of the district court denying Beaty's petition for writ of habeas corpus is included as Appendix B.

## STATEMENT OF JURISDICTION

The State respectfully requests that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, issued on August 27, 2002. That court denied the State's timely petition for rehearing and for rehearing en banc on October 25, 2002. The State timely filed the petition for writ of certiorari within 90 days of that decision. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1254(1); and Supreme Court Rule 10.

## PROVISIONS INVOLVED

The Fifth Amendment provides in part;

> No person . . . shall be compelled in any criminal case to be a witness against himself, . . . .

Former 28 U.S.C. § 2254(d), which stated in part:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . evidenced by a . . . written opinion . . . shall be presumed to be correct. . . .

## STATEMENT OF THE CASE

### I. FACTUAL BACKGROUND.

At approximately 6:00 p.m. on May 9, 1984, 13-year-old Christy Ann Fornoff ate dinner with her family in Tempe, Arizona. After dinner, Christy and her mother Carol went to the nearby Rock Point Apartments so that Christy could make collections for her newspaper route.

While Christy's mother talked with an acquaintance at the entrance to the apartment complex, Christy went to # 207, then walked in the direction of # 150. In 5 minutes, Christy's mother began looking for her. She found Christy's bicycle in front of # 150. After looking and calling for Christy, her mother went home to get help. Unsuccessful in her efforts, she called the police at 8:30 p.m.

Roger Fornoff joined in the search for his daughter at the apartment complex. He met Donald Beaty, the maintenance man. Beaty accompanied him to check out the apartments occupied by Christy's customers—Beaty was not one of her customers. Later, Roger went to #246, Beaty's apartment on the second floor. He knocked on the door, but nobody answered.

When the police arrived, Beaty assisted by letting them into vacant apartments. He never suggested that they search his apartment. The police eventually recovered Christy's collection book in a field near the complex, but they could not find Christy.

At 4:50 a.m. on May 11, 1984, Robert Jark, who lived in #146 directly beneath Beaty, pulled his truck up in front of his apartment to load tools. He had his headlights on, illuminating the dumpster behind which Beaty would shortly thereafter claim to have discovered Christy's Fornoff's body. Jark saw no body; he was "very sure" that he would have seen the victim's legs sticking out from behind the dumpster (as Beaty later claimed to have found her) if the body had been there.

That same morning, Joseph Kapp, another tenant at the Rock Point, left his apartment to throw a bag of trash into the dumpster. He saw Beaty in the middle of the parking lot. As Kapp approached the dumpster, Beaty told him not to disturb anything because he had discovered a body. Kapp threw his trash into the dumpster, but saw no body. When he told Beaty that he had not seen a body; Beaty told him that the body was behind the dumpster. Kapp walked behind the dumpster and saw the body. The victim's feet were not sticking out beyond the edge of the dumpster, as they were depicted in a police photograph of the scene taken later that same day. Kapp asked Beaty if he thought that the corpse might be the missing girl. Beaty replied that he thought so. Beaty told Kapp that he had already called the police. They talked for 5 to 7 minutes but the police did not arrive. When Kapp walked back into his apartment, he looked at the clock: it was 5:50 a.m.

Beaty called the Tempe Police Department at 5:52 a.m.—after Joseph Kapp walked back to his apartment. When the police arrived, they discovered the victim's body partially behind the dumpster with the lower portion of her legs sticking out. The victim was wrapped in a sheet that covered her body except for the lower part of the legs. When Detective Mike Palmer opened the sheet, he observed that the victim's bathing suit had been pulled down to expose her breasts, and that her shorts were unzipped. A brownish material resembling vomit on her lips, face, and nose caused the sheet to stick to her face.

During an interview at the Tempe Police Department the next day, Beaty asserted that the officers who went door to door at the complex the night Christy disappeared searched his apartment. However, Officers Marshall and Sargent testified that they did not search Beaty's apartment the night Christy disappeared.

The medical examiner testified that Christy died from asphyxia due to smothering. The undigested food in her stomach indicated that she had eaten no longer than 2 hours prior to her death. Due to the lack of decomposition of the body, he concluded that Christy's corpse had been kept at a temperature between 30 to 70 degrees. Christy had been

sexually assaulted, either contemporaneously with, or immediately after, she was asphyxiated.

While participating in a consensual search of Beaty's apartment the day after he reported finding the body, Tempe Detectives Gary Lindberg and Tony Ippolito noticed that the thermostat was set at 65 degrees. Beaty told them that was the normal temperature.

Criminalist Ed Trujillo testified that Christy Fornoff had type A blood, and Beaty had type B. None of the other 19 male residents of the Rock Point Apartments had type B blood. The semen stains on the sheet in which Christy was wrapped were consistent with ejaculation from a male with Beaty's blood type, PGM type, and PGM sub-type. The vaginal smear from the victim was consistent with intercourse between a person of her blood type and Beaty's blood type. The blood stain on the sheet was consistent with Beaty's blood type. The vomitous material on the inside of the bedroom closet doors removed from Beaty's apartment, the vomitous material on the sheet in which the victim was wrapped, and the victim's stomach contents all indicated that a type A secreter —Christy's type—produced that material.

Fibers found in the sheet wrapped around Christy, and from her shorts, were similar in every way to fibers from the carpet in the closet in Beaty's apartment. The police collected a total of 8 hairs similar to the victim's head hair from Beaty's closet carpet, his couch, a sheet in his master bedroom, and the master bathroom. A total of 17 hairs similar in all characteristics to hair from Beaty's mustache, head, arms, armpits, legs, and pubic area, were found between Christy's legs, in her shorts, in her vaginal area, and in the sheet in which she was wrapped.

Dr. George O'Connor, a psychiatrist, testified about a group session in which Beaty participated while awaiting trial. The men had engaged in sophomoric behavior toward the women, and Dr. O'Connor hoped that the group would enable the males to treat the women with respect. Before participating in the group, Beaty signed an "Interpersonal Relationships Group Contract," according to the terms

of which all communications within the group would be kept confidential.

About 10 minutes after the group ended a session, Beaty approached Dr. O'Connor and, in the presence of detention guards and other members of the group, spontaneously told him that he did not feel that he was the terrible thing that group members accused him of being, that he did not mean to kill the little Fornoff girl; she became rather loud and Beaty knew that her mother was just outside, so he muffled her to keep her from screaming by putting his hand over her face.

## II. PROCEDURAL BACKGROUND.

Beaty appealed his convictions and sentences to the Arizona Supreme Court. While the appeal was pending, he filed his first petition for post-conviction relief in April 1986. After the trial court denied post-conviction relief, the Arizona Supreme Court consolidated the direct appeal with review of the denial of post-conviction relief and rejected all claims. *State v. Beaty,* 762 P.2d 519 (Ariz. 1988).

Beaty filed a second state petition for post-conviction relief on May 20, 1988. The trial court determined that, because the Arizona Supreme Court had denied Beaty's motion to stay the appeal, and his motion for rehearing was pending before that court, the trial court had no jurisdiction to consider the matter.

Beaty filed his third state petition for post-conviction relief on October 25, 1990. The trial court denied the petition. Appointed counsel filed an untimely supplemental petition that the trial court refused to consider. The Arizona Supreme Court denied the petition for review without comment on September 25, 1991.

On February 6, 1992, Beaty filed his fourth petition for post-conviction relief, and supplemented it on February 28, 1992. On December 2, 1992, the trial court held that each of the issues in the petition and its supplement were, or could have been, raised earlier and, therefore, Beaty was procedurally precluded from relief pursuant to

Rule 32.2, Arizona Rules of Criminal Procedure. Beaty did not seek review by the Arizona Supreme Court.

On November 6, 1992, Beaty filed a petition for habeas corpus in the district court, raising 21 claims of error. He filed a supplemental petition on October 13, 1993, raising 32 claims of error. On November 24, 1999, the district court ruled that 20 issues were procedurally barred, and that Beaty could not show legitimate cause to excuse the bar, or actual prejudice. (Appendix B at 47–67.) The district court denied relief on the merits of the remainder of the claims, and dismissed the petition. (*Id.* at 5–47.)

The Ninth Circuit affirmed the district court's denial of relief on every issue except one: voluntariness of the confession. (Appendix A.) On that issue, the district court remanded to the district court for an evidentiary hearing. (*Id.* at 23–25.)

## REASONS WHY THE WRIT SHOULD ISSUE

The opinion of the Ninth Circuit conflicts with decisions of this Court, as well as the factual findings of the Arizona Supreme Court. When discussing the *Miranda* issue, the Ninth Circuit acknowledged that the Arizona Supreme Court had found that Beaty's confession did not result from "interrogation," but was, instead, spontaneous. (Appendix A at 20.) It stated "[w]e are firmly convinced that O'Connor neither questioned Beaty nor engaged in the functional equivalent." (*Id.*) The court noted that Beaty "has not shown with any specificity that the factual record is inadequately developed to assess whether he was interrogated." (*Id.* n.8.) The court also conceded that "[t]he factual record clearly reveals that the group sessions were not deliberately designed to elicit incriminating remarks." (*Id.* at 21.)

Nevertheless, the Ninth Circuit completely ignored the state court's factual findings that Beaty's statements were not covered by the confidentiality agreement because he did not make them during the group session and they did not pertain to group business; the state court went on to conclude that, under the totality of the circumstances, the

statements were voluntary. Such disregard for the state court's subsidiary factual findings violates this Court's holding in *Sumner v. Mata*, 449 U.S. 539 (1981), and former 28 U.S.C. § 2254(d) (in the absence of specified exceptions, federal courts must accord a presumption of correctness to factual findings of a state court), and warrants summary reversal.[1]

Second, in addition to ignoring the Arizona Supreme Court's factual findings, the Ninth Circuit held that the trial court "appear[ed]" to have limited the hearing on admissibility of the confession to the issue of physician-patient privilege, and did not permit Beaty to develop facts about voluntariness. (Appendix A at 24.) His trial counsel made no such protest. More importantly, every attorney who has represented Beaty in post-trial proceedings has argued that trial counsel was ineffective for *not raising voluntariness* at that hearing; no attorney has contended that the trial court denied Beaty the opportunity to develop facts at the hearing. Thus, through counsel, Beaty has consistently maintained in state and federal court a position that directly contradicts the Ninth Circuit's assertion that he presented the issue of voluntariness at the hearing, but was prevented from developing it.

When the Ninth Circuit, sua sponte, found a limitation on Beaty's ability to develop facts, it committed a third error: because Beaty has never claimed that the trial court limited his ability to develop facts at the hearing, that issue is *unexhausted* and may not form the basis for relief in federal habeas corpus absent a showing of cause and prejudice. Just as it ignored the Arizona Supreme Court's factual findings on the confidentiality agreement, the Ninth Circuit simply ignored the unexhausted nature of its self-generated claim, and ordered a hearing on the basis of its own creation.

The three errors described above violate this Court's holdings and statutory limitations on the granting of relief in federal habeas corpus. A federal circuit court should not be allowed to ignore the factual

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1. Beaty filed his habeas petition prior to the enactment of the AntiTerrorism and Effective Death Penalty Act of 1996.

findings of a state court, conjure up a limitation never argued by the defendant, and remand for a hearing on the basis of an unexhausted claim. For these reasons, the Court should grant certiorari, reverse the Ninth Circuit, vacate the order of remand, and order that court to give the state court's factual findings on the confidentiality agreement a presumption of correctness.

## ARGUMENTS

### I

### THE NINTH CIRCUIT MAY NOT SIMPLY IGNORE THE ARIZONA SUPREME COURT'S FACTUAL FINDINGS ON THE CONFIDENTIALITY AGREEMENT.

#### A. THE CONFESSION AND THE CONFIDENTIALITY AGREEMENT.

Beaty confessed to the murder following a prison group therapy session. The following facts concerning the circumstances of Beaty's confession are taken from the Arizona Supreme Court's opinion:

> The defendant . . .participate[d] in group counseling sessions involving five women and four other men . . . . The purpose of these sessions was to see if by bringing prisoners closer together they would not see each other as sex objects, but rather as human beings and become more respectful toward one another. The facility had previously had problems with inmates creating disturbances by yelling profanities back and forth. The defendant was asked to volunteer because he had been displaying adolescent-type behavior toward the female inmates. The group was experimental and organized as a research project for Dr. O'Connor . . . . Dr. O'Connor testified that he was not treating the defendant in particular during the sessions. Rather it was a group activity for all ten people. . . .

*State v. Beaty*, 762 P.2d 519, 524–25 (Ariz. 1988).

Before participating in the experimental group, Beaty signed a document entitled "Interpersonal Relationships Group Contract." The provisions of it were as follows:

> Please read the following guidelines and sign below.
>
> 1. I will attend each group meeting unless I have other "official" committments [sic] e.g. court because I am an important part of this group. I AM this group.
>
> 2. I have the ability to observe my own behavior; I can distinguish my actions as [appropriate] or inappropriate. Should I choose to behave inappropriately, I will be asked to leave the group.
>
> 3. I understand that all group communication is confidential and therefore group business cannot be discussed outside of group. Only in this way can I feel free to express my feelings.
>
> 4. I am committed to myself, and therefore to this group to learning about myself, my feelings and my behavior about relationships. I understand that growth will come from examining my thoughts, feelings and behavior in my relationships. Finally I accept the responsibility of being good to myself.
>
> I, *Donald E. Beaty*, have read the guidelines listed above and I agree to follow them as a group member.
>
> *[s] Donald Beaty 722862*
> Name
> *11-15-84*
> Date

I, *Lilly Epler* understand that my job as therapist is to assist *Don* with his/her growth in relationships. I am personally committed to this goal with *Donald Beaty*.
[s] *Lilly Epler*.
Name
*Nov. 15, 1984*
Date

*Beaty*, 762 P.2d at 525.

Beaty confessed after one of the group sessions had ended:

> After one of the sessions had ended, some of the members, including the defendant, stood in line to wait to talk to Dr. O'Connor. When it was the defendant's turn, he told Dr. O'Connor that he had suffocated the victim. Dr. O'Connor testified:
>
> > [T]hat Mr. Beaty approached me and said that he did not feel that he was the terrible thing that people, meaning the group members, had accused him of being, that he did not mean to kill the little Fornoff girl; that she had become rather loud. I believe implicated that her mom was just outside or downstairs and that he then motioned as if to show me that he went to muffle her, keep her from screaming by muffling her by putting his hand over her face.
> >
> > . . . . .
> >
> > Dr. O'Connor testified further:
> >
> > Q. [By Mr. Thurston] And at the time that the statements were made, what room were you in out there?

A. [By Dr. O'Connor] It would be part of the physical plant called the multi-purpose room, it's a very large center area. It would be like an atrium.

Q. Approximately how long after the conclusion of the experimental research session was it that Mr. Beaty was making the statements?

A. I don't remember exactly, it would have been within minutes, could have been 15 minutes.

Q. And at the time that the statements were made, were there other persons present?

A. Oh, there were other people present.

Q. Okay. And besides yourself and Mr. Beaty, who else?

A. Probably some of the detention guards and various of the ten-people-group that tended to cluster around after the group to get our attention and ask for medication increases or whatever.

762 P.2d at 525–26.

B. CHALLENGE TO VOLUNTARINESS.

*1. Post-conviction petition during pending appeal.*

At a mid-trial hearing, Beaty challenged the admissibility of his confession on the basis of the physician-patient privilege, but the trial court rejected that argument.[2] After his conviction, and while the direct appeal was pending, he filed a petition for post-conviction relief. In that petition, he claimed, for the first time, that his statements to Dr.

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2. The Arizona Supreme Court also rejected this contention on appeal. *Beaty*, 762 P.2d at 526–27.

O'Connor were involuntary because the confidentiality agreement he signed prior to participating in the group assured him that all group communications would be confidential. New counsel also asserted that Beaty's trial attorney was ineffective for failing to argue that his confession was involuntary due to the agreement. But Beaty did *not* contend that the trial court *prevented* him from presenting the issue of voluntariness at the mid-trial hearing, or from developing facts, and he did not ask for an evidentiary hearing to develop additional facts. The trial court denied relief, and the Arizona Supreme Court consolidated review of that denial with the direct appeal.

### 2. *Argument to Arizona Supreme Court.*

In his brief to the Arizona Supreme Court, Beaty argued that his confession was involuntary due to the confidentiality agreement. He did not contend that he raised voluntariness at the mid-trial hearing on the admissibility of the confession, or that the trial court would not allow him to develop facts at the hearing. More importantly, *he did not assert that the record before the Arizona Supreme Court was factually inadequate to decide the voluntariness issue*, and he did not ask the Arizona Supreme Court to remand to the trial court for an evidentiary hearing.

## C. ARIZONA SUPREME COURT'S FACTUAL FINDINGS.

The Arizona Supreme Court rejected the involuntariness argument based on the confidentiality agreement, and made factual findings about the scope of that agreement:

> Defendant next claims his statements to Dr. O'Connor were involuntary because they were induced by a promise of confidentiality.
>
> The defendant claims that the Interpersonal Relationships Group Contract he signed contained a promise that makes his inculpatory statements to Dr. O'Connor involuntary. He claims that he only spoke to Dr. O'Connor

because he believed all his communications with the psychiatric staff were confidential. We do not agree.

The defendant's inculpatory statements were not regarding group business nor were they given during the group session. The statements were not induced by defendant's membership in the group. They were unrelated to the group sessions and were spontaneously made.

*Beaty*, 762 P.2d at 527.

D. GOVERNING LAW.

Former 28 U.S.C. § 2254(d) (present § 2254(d)(1)) provided that, in the absence of specified exceptions, a federal court must accord a presumption of correctness to the resolution of factual issues by a state court of competent jurisdiction after a hearing on the merits by that court. In the seminal case in this area, this Court, vacating the Ninth Circuit's judgment, said:

Section 2254(d) applies to cases in which a state court of competent jurisdiction has made "a determination after a hearing on the merits of a factual issue." It makes no distinction between the factual determinations of a state trial court and those of a state appellate court. Nor does it specify any procedural requirements that must be satisfied for there to be a "hearing on the merits of the factual issue," other than that the habeas applicant and the State or its agent be parties to the state proceeding and that the state-court determination be evidenced by "a written finding, written opinion, or other reliable and adequate written indicia." Section 2254(d) by its terms thus applies to factual determinations made by state courts, whether the court be a trial court or an appellate court. . . . This interest in federalism recognized by Congress in enacting 2254(d) requires deference by federal courts to factual determinations of all state courts. . . .

*Sumner v. Mata*, 449 U.S. at 546–47.

This Court went on to note that the Ninth Circuit did not refer to 2254(d), and the "opinion gives no indication that § 2254(d) was even considered." *Id.* at 547, 549. The Court stated that Congress, in enacting 2254(d), "contemplated at least some reasoned written reference to § 2254(d) and the state-court findings." *Id.* at 549.

E. ARGUMENT.

The Arizona Supreme Court made clear factual findings about the confidentiality agreement. Those findings appear in a published opinion. The State argued in the district court, and before the Ninth Circuit, that the findings concerning the confidentiality agreement were entitled to a presumption of correctness under § 2254(d).[3] Based on the record, the Arizona Supreme Court found that (1) Beaty's confession was not induced by his membership in the group; (2) the confession was not related to group business, and it was not given during the group session; and (3) the confession was spontaneous. 762 P.2d at 527. Looking at the same record, the Ninth Circuit agreed that Dr. O'Connor "neither questioned Beaty nor engaged in the functional equivalent." (Appendix A at 20.) That court further found that the group sessions were not deliberately orchestrated by the State to elicit incriminating remarks. (*Id.* at 21.) Nevertheless, the court ordered an evidentiary hearing to address whether the confidentiality agreement resulted in a coerced confession.

The record fully supports the Arizona Supreme Court's finding that Beaty's confession was volunteered, thus voluntary. Nevertheless, despite the void in the record of any evidence of State coercion or improper inducement, and despite the state court's entitlement to a presumption of correctness under § 2254(d), the Ninth Circuit insists that an evidentiary hearing is necessary—nearly 20 years later—to determine "the reasonableness of Beaty's asserted belief that his

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3. After according the Arizona Supreme Court's findings a presumption of correctness because they were fairly supported by the record, the district court went on to hold that the confession was voluntary under the totality of the circumstances. (Appendix B at 19–27.)

statements were protected by the terms of the agreement, . . . ." (Appendix A at 23.)

Without improper state coercion, the "reasonableness" of Beaty's asserted belief that the confidentiality statement protected his remarks to Dr. O'Connor after the group session is of no import. *See Colorado v. Connelly*, 479 U.S. 157, 164 (1986) (absent coercive misconduct by state action that is causally related to the confession, there is no basis for concluding that any state actor has deprived a criminal defendant of due process of law). This "Court has insisted that the 'constitutional guarantee is only that the witness not be *compelled* to give self-incriminating testimony.'" *McKune v. Lile*, 536 U.S. 24, 122 S. Ct. 2017, 2026 (2002) (quoting *United States v. Washington*, 431 U.S. 181, 188 (1977)) (emphasis original). From the existing record, including the unchallenged state court finding that the confession was "spontaneous," a reviewing court can determine that there was no improper state coercion.

Moreover, the Ninth Circuit does not even mention the findings of the Arizona Supreme Court on the confidentiality agreement, or § 2254(d). In accordance with the requirements of *Sumner v. Mata*, and § 2254(d), the State respectfully requests that the Court vacate the opinion of the Ninth Circuit and remand to that court with instructions to give a presumption of correctness to the state court's factual findings on the confidentiality agreement.

## II.

## BEATY HAD A FAIR OPPORTUNITY TO DEVELOP THE FACTS IN STATE COURT AND IS NOT ENTITLED TO AN EVIDENTIARY HEARING.

Before remanding this case to the district court for an evidentiary hearing, the Ninth Circuit stated that, "The critical question before us is whether Beaty reasonably believed that his statements were protected by the state's confidentiality agreement." (Appendix A at 23.) Ignoring the Arizona Supreme Court's factual findings about the agreement and

§ 2254(d), the Ninth Circuit said: "[T]he factual record is not adequately developed for us to assess this question with any confidence." (*Id.*) The Ninth Circuit justified a remand on the basis of two erroneous premises: (1) that Beaty's counsel raised the voluntariness issue at a mid-trial hearing; and (2) that the trial judge limited the hearing to the issue of physician-patient privilege. Both of these conclusions lack support in the record. The Ninth Circuit's remand amounts to granting an evidentiary hearing on the basis of an unexhausted issue.

A. EVIDENTIARY HEARING IN TRIAL COURT.

Unaware prior to the first trial that Beaty had confessed to Dr. O'Connor, the prosecutor, on learning of the confession in the middle of the second trial, filed a motion to depose the doctor. The doctor claimed that the confession was privileged, and refused to speak with the prosecutor. The State asked the trial court to hold a hearing to determine whether the confession was privileged, and to order Dr. O'Connor to testify if it was not.

Prior to the hearing, Michael Miller, Beaty's attorney, filed a memorandum arguing only that Beaty's confession fell within Arizona's physician-patient privilege. He did not argue that the confession was inadmissible for any other reason.

Minutes before the hearing began, Mel McDonald, counsel for Dr. O'Connor, presented the trial court with a memorandum on behalf of Dr. O'Connor. Although the memorandum focused principally on privilege, McDonald argued at the end of it that the confession was involuntary because Beaty was in custody undergoing psychiatric care. The memorandum made no reference to the confidentiality agreement.

The trial judge stated that he had not read McDonald's memorandum. Beaty's counsel did not ask the trial court to read the memorandum before taking evidence; counsel said nothing about the confidentiality agreement or wanting to explore the voluntariness of the confession. During the hearing, Beaty's attorney did not ask Dr.

O'Connor about the confidentiality agreement, or argue that the confession was involuntary due to the agreement.

*After* the trial court heard testimony and ruled that Beaty's statements were not protected by Arizona's physician-patient privilege, Beaty's counsel asked permission to adopt McDonald's memorandum as his own, which the trial court granted. However, counsel did not ask to present any additional evidence.

B. POST-CONVICTION PETITION DURING PENDING APPEAL.

As the State pointed out in Argument I, Beaty first raised an involuntariness argument based on the confidentiality agreement in his first petition for post-conviction relief, filed while his appeal was pending. It was so clear to his new counsel that his trial attorney had not raised voluntariness during the mid-trial hearing that the new attorney contended that trial counsel was ineffective for not raising that issue:

> Miller [trial counsel] made no such [voluntariness] objection at the trial court level in his Response to the State's Motion to Depose Dr. O'Connor, in his argument on that motion or in his Motion for a New Trial. The only reference to voluntariness in the entire record is that discussed in McDonald's Memorandum . . . on behalf of Dr. O'Connor. . . . [T]he assertion of a voluntariness objection by Mr. McDonald on behalf of Dr. O'Connor does nothing to preserve that issue for Beaty.

Beaty did not claim that the trial court prevented him from developing facts at the hearing, and he did not request an evidentiary hearing to develop additional facts about the confidentiality agreement.

C. ARGUMENT ON APPEAL.

On the consolidated appeal, when Beaty argued involuntariness on the basis of the confidentiality agreement, he had already conceded in

the record that he did not present that issue to the trial court until he filed his first petition for post-conviction relief. Moreover, in his briefs to the Arizona Supreme Court, he relied on the language of the agreement itself; he did not ask that court to remand for an evidentiary hearing to develop additional facts.

D. DISTRICT COURT.

In the district court, Beaty did not assert that trial counsel's verbal adoption of McDonald's memorandum raised the issue of voluntariness at the mid-trial hearing, or that the trial court prevented him from developing facts. To the contrary, habeas counsel argued that trial counsel was ineffective for *not* raising voluntariness:

> Petitioner's [trial] counsel never raised, by objection or otherwise, the voluntariness of Petitioner's statements.

E. ARGUMENT.

The Ninth Circuit here has done precisely what this Court has condemned in a recent AEDPA case: ignored the record and substituted its own judgment for what the record says, a judgment that in fact is contradicted by the record.

In *Woodford v. Visciotti*, ___U.S.___, 123 S. Ct. 357 (2002), this Court reversed the Ninth Circuit for substituting its own judgment in applying the provisions of 28 U.S.C. § 2254(d)(1). The Court admonished the Ninth Circuit that an "unreasonable application" of federal law was different from an "incorrect application" of that law; the Ninth Circuit could not grant habeas relief because it thought that the California courts had incorrectly applied federal law. 123 S. Ct. at 360. The Ninth Circuit based its decision on *its perception* of what the California courts did, and did not, take into account in determining the claim of ineffective assistance of counsel. *Id.* This Court noted that the new habeas statute authorized relief only if the state court's application of federal law was "objectively unreasonable," not merely because the

Ninth Circuit disagreed with the state court's assessment of certain factors. *Id.* at 361.

The same principle applies equally to pre-AEDPA cases because the state court's factual findings are presumed correct. *Sumner*, 449 U.S. at 546–47. In this case, in order for the Ninth Circuit to conclude that the trial court limited the hearing to the question of privilege, the record would have to show clearly that Beaty *raised* voluntariness at the hearing, but the trial court would not permit him to develop that issue.

The Ninth Circuit's conclusion that Beaty raised voluntariness at the hearing is objectively unreasonable: (1) the prehearing memorandum of Beaty's counsel mentioned nothing about voluntariness; (2) the memorandum submitted by McDonald, Dr. O'Connor's counsel, was delivered minutes before the hearing; (3) the trial court stated that it had not read the memorandum, and Beaty's attorney did not ask the trial court to read it prior to taking evidence; (4) Beaty did not ask Dr. O'Connor about the confidentiality agreement or offer any argument about the voluntariness of the confession; (5) *after* the trial court ruled on the issue of privilege, Beaty asked to adopt McDonald's memorandum, but he still said nothing about the confidentiality agreement, and he did not ask the trial court to hear additional testimony.

The Ninth Circuit has disregarded the record in this case. When the Ninth Circuit, in a footnote, stated that Beaty clearly raised a Fifth Amendment claim by adopting McDonald's memorandum, it did not set forth the pertinent chronology of facts, and it did not note that Beaty's attorney adopted the pleading only after the trial court had heard the testimony and ruled. (Appendix A at 24 n.10.)

If this issue were cast in terms of exhaustion, *i.e.*, fair presentation of the voluntariness issue at the hearing, the Ninth Circuit would have no objective basis, under this Court's precedents, for concluding that Beaty fairly presented the voluntariness claim at the hearing. In *Duncan v. Henry*, 513 U.S. 364 (1995), this Court emphasized what it meant by "fair presentation" of a federal claim to the state court:

> If state courts are to be given the opportunity to correct alleged violations of prisoners federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution. If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law . . . he must say so, not only in federal court, but in state court. . . .

513 U.S. at 365–66.

Beaty did not alert the trial court that he wanted to raise a federal claim by his post-testimony, post-ruling request to adopt another attorney's memorandum. Thus, under *Henry* and *Picard v. Connor*, 404 U.S. 270 (1971), he is not entitled to an evidentiary hearing on voluntariness. In addition, the Ninth Circuit's conclusion that Beaty raised voluntariness at the hearing is refuted by the pleadings of every attorney who has represented Beaty since he was convicted. Those attorneys unanimously have attacked trial counsel for not raising voluntariness at the hearing.

Not only is the Ninth Circuit's conclusion that Beaty presented a voluntariness claim at the hearing refuted by the record, that court's statement that the trial court limited the hearing is the same kind of error the Ninth Circuit made in *Visciotti*: substituting *its perception* of things for what the record clearly shows. First, no attorney for Beaty has argued that the trial court limited the evidence at the hearing. Second, the brief exchange cited by the Ninth Circuit in the opinion had nothing to do with voluntariness. (Appendix A at 24.) The prosecutor was merely developing the background of how Dr. O'Connor became acquainted with Beaty, and Beaty's counsel objected. Third, the Ninth Circuit's observation that the trial court "seemed to limit the scope of the hearing" is nothing more than its misperception of what transpired. There is not one word in the transcript of that hearing that objectively supports the Ninth Circuit's conclusion. In order to have limited the hearing, the trial court would first have to have been aware that Beaty wanted to raise something besides privilege—and the record undeniably

shows that Beaty's attorney never informed the trial court that he wanted to raise something in addition to privilege.

The final error the Ninth Circuit makes in substituting its perception for the facts is to remand to the district court for an evidentiary hearing. Because Beaty never argued, in state or federal court, that the trial court limited his ability to develop facts at the hearing, the assertion of limitation is an *unexhausted* issue, and may not form the basis for relief unless he shows cause and prejudice. It is unjust, and contrary to this Court's cases on exhaustion of claims, to remand a 20-year-old case for a hearing on the basis of an alleged limitation in state court when the defendant never raised that issue.

This case is governed by *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). Beaty had the chance at the hearing to present evidence relative to the voluntariness of his confession, but he did not do so. When a defendant has had the opportunity to develop a factual issue in state court and fails to do so, he is not entitled to an evidentiary hearing in federal court absent a showing of cause and prejudice, or a fundamental miscarriage of justice. 504 U.S. at 11.

## CONCLUSION

Based on the foregoing authorities and arguments, the State respectfully requests this Court to grant the petition for writ of certiorari, to vacate the Ninth Circuit's opinion, to remand to that court with instructions to give a presumption of correctness to the state court's factual findings on the confidentiality agreement, and not to grant an evidentiary hearing absent a showing by Beaty of cause and prejudice for failure to have previously alleged a limitation on the hearing in state court.

Respectfully submitted,

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# APPENDICES

**APPENDIX A**

**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DONALD EDWARD BEATY,
*Petitioner-Appellant,*

v.

TERRY STEWART, Director,
*Respondent-Appellee.*

No. 00-99007
D.C. No.
CV-92-02976-
PHX-RGS

OPINION

Appeal from the United States District Court
for the District of Arizona
Roger G. Strand, District Judge, Presiding

Argued and Submitted December 6, 2001
Submission Deferred January 29, 2002
Resubmitted August 15, 2002
Seattle, Washington

Filed August 27, 2002

Before: Diarmuid F. O'Scannlain, Susan P. Graber,
M. Margaret McKeown, Circuit Judges.
Opinion by Judge O'Scannlain

## COUNSEL

John E. Charland, Phoenix, Arizona, argued the cause for the petitioner-appellant. Jess A. Lorona, Horne Ducar Lorona & Slaton, LLP, was on the briefs.

Kent E. Cattani, Chief Counsel, Criminal Appeals Section, Phoenix, Arizona, argued the cause for the respondent/appellee. Janet Napolitano, Attorney General, Jack Roberts, Assistant Attorney

## OPINION

O'SCANNLAIN, Circuit Judge:

In this capital habeas case, we must decide whether the admission of a confession obtained by a jail psychiatrist constitutes prejudicial error. We also consider several other claims, including whether trial counsel rendered ineffective assistance of counsel in failing to pursue allegations of juror misconduct.

### I

On May 9, 1984, thirteen-year-old Christy Ann Fornoff disappeared at a Tempe, Arizona apartment complex while making collections for her newspaper route. Donald Beaty, a maintenance person for the complex, actively assisted the police in searching for Fornoff. Although the police located her collection book near the complex, she was nowhere to be found.

In the early morning of May 11, Joseph Kapp, a tenant, encountered Beaty while throwing out his trash. Beaty told Kapp that he had found a body behind the dumpster and that he had called the police. Kapp observed the body, spoke with Beaty for a few minutes, and then returned to his apartment.

The police later arrived and determined that the body was Fornoff's. A medical examiner concluded that Fornoff had been asphyxiated by smothering and that she had been sexually assaulted, either contemporaneously with or shortly after her death. The examiner also opined that she had died within two hours of her disappearance.

The police focused their investigation upon Beaty. Vomit smeared on the body matched a substance found in Beaty's closet. The blood, semen, and hair found on the body was consistent with Beaty's. Hair found on Beaty's closet carpet, couch, bedroom, and bathroom was consistent with Fornoff's. Fibers found on the body matched Beaty's carpet and a blanket in his bedroom. Ferret hair was found on

the body; the tenant who lived in Beaty's apartment a few months prior to the murder owned a ferret.[1]

Police records showed that Beaty had called the police at 5:52 a.m. According to Kapp, he had returned to his apartment at 5:50 a.m. The timing suggested that Beaty had lied to Kapp about having called the police. The police also speculated that Beaty had moved the body after speaking with Kapp. Robert Jark drove his truck in front of the dumpster at approximately 4:50 that morning. As with Kapp, Jark was sure that a body was not visible from in front of the dumpster. However, when the police arrived, the body stuck out noticeably beyond the dumpster's edge.

Beaty told police that he was with George Lorenz, a tenant, at the time Fornoff disappeared, and that Teresa Harder, another tenant, saw them together. However, Lorenz denied being with Beaty that night, and Harder similarly denied seeing them together. Beaty also claimed that the police had searched his apartment the night Fornoff disappeared. However, the two officers who searched the complex claimed that they did not enter Beaty's apartment. Finally, the police found it suspicious that Beaty had attempted, unsuccessfully, to borrow a friend's car at 11:30 p.m. the night after Fornoff disappeared. The police speculated that Beaty wanted to borrow a car to move the body.

On May 21, 1984, Beaty was arrested and charged with Fornoff's murder and sexual assault. A day later, Dr. George O'Connor, a prison psychiatrist, met with Beaty for about an hour. O'Connor routinely met with newly admitted, high-profile inmates to determine whether they were a threat to themselves. The record does not reveal much about their conversation. O'Connor apparently inquired whether Beaty felt depressed and whether he wished to talk with someone on a regular basis. O'Connor and Beaty also discussed a medical problem Beaty was having with his foot and Beaty's family's reaction to his

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[1] It is worth noting that the owner of the ferret, Angel Bello, has a lengthy criminal record, including sexual assault convictions in 1981 and 1988. While Bello testified at Beaty's trial, the jury was not informed of his criminal history.

arrest.

After the conversation, O'Connor concluded that Beaty was not suffering from any significant psychiatric problems. Nonetheless, O'Connor decided that he would occasionally drop by and check up on him. The following day, O'Connor spoke with Beaty about his foot and arranged for him to be seen by an orthopedic doctor. The record does not reveal whether O'Connor and Beaty discussed anything other than Beaty's foot problem.

Approximately two months later, O'Connor recommended transferring Beaty from the main jail to the jail's psychiatric facility. O'Connor's supervisor approved the recommendation, and Beaty did not object to the transfer. Several factors motivated O'Connor's recommendation to transfer Beaty. First, Beaty needed space to rehabilitate his injured foot. Beaty had been confined to his cell from the time of incarceration because of several death threats from other inmates. Second, the jail's psychiatric facility offered a safer place for Beaty because it was isolated from the jail's general population. Third, Beaty was becoming increasingly agitated and depressed, perhaps because of his confinement to his cell. Indeed, Beaty underwent a hunger strike, and he also repeatedly complained that inmates were harassing him.

The record is unclear as to the nature and the extent of the treatment Beaty received while at the psychiatric unit. In any event, Beaty participated in a "counseling group" moderated by O'Connor. The group consisted of five female and five male inmates, including Beaty. The purpose of the group was to foster respect between male and female inmates by bringing them together in a small group. O'Connor described the group's purpose as "bring[ing] men and women prisoners together to explore the difficulties that they may have had in interrelating with members of the opposite sex in their personal lives." O'Connor chose Beaty for the group; while Beaty had the option of not participating, he likely would have been transferred back to the main jail if he had refused.

Beaty, along with the rest of the group participants, signed a document entitled "Interpersonal Relationships Group Contract." The document stated that any information disclosed to the group would be kept confidential. Specifically, it stated, "I understand that all group communication is confidential and therefore group business cannot be discussed outside of group. Only in this way can I feel free to express my feelings."

The group met twice a week and each session lasted between an hour and an hour-and-a-half. During these sessions, group members occasionally harassed Beaty regarding the nature of his crime. In particular, some group members called him "cold blooded."

After a few weeks, Beaty approached O'Connor at the end of a session. It was about five to ten minutes after the session had formally ended, but some of the group was still milling around. Beaty and O'Connor were conversing casually[2] when Beaty suddenly complained that the group had unfairly labeled him a "terrible thing." He told O'Connor that he did not mean to kill Fornoff. He explained that he accidentally suffocated her when he put his hand over her mouth to muffle her screams. While O'Connor was surprised by Beaty's confession, he described the statement as an "overflow of feelings from that particular group."

O'Connor did not immediately disclose Beaty's confession to anyone, and the case proceeded to trial. The state's case rested primarily on the physical evidence tying Beaty to the crime. The state also stressed the events surrounding Beaty's discovery of the body and the fact that two witnesses discredited his alibi. Beaty, in turn, attacked the reliability of the state's physical evidence. He stressed that Kapp had been playing a "drinking game" that morning. Beaty suggested that another unknown tenant committed the murder and he faulted the police for not thoroughly investigating the other tenants. Finally, Beaty emphasized that he had actively assisted the police in searching for

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[2] Specifically, O'Connor testified that he was "not questioning Mr. Beaty particularly. It [was] casual."

Fornoff the night she disappeared. On March 18, 1985, the trial court declared a mistrial after the jury deadlocked ten to two in favor of guilt.

On May 8, 1985, Beaty's second trial commenced. Two days later, O'Connor went to state court to testify in an unrelated case. While waiting to testify, O'Connor spoke casually with a detention officer. During the course of the conversation, O'Connor disclosed Beaty's confession. The prosecution quickly learned about the conversation and contacted O'Connor. O'Connor refused to testify but, after an evidentiary hearing, the trial court ordered him to do so.

During the second trial, the state presented much of the same evidence as it had offered at the first trial, but with the addition of O'Connor's testimony. The jury unanimously found Beaty guilty of first degree murder and sexual assault. The judge thereafter conducted a sentencing hearing without a jury. The judge imposed the death penalty after finding one aggravating circumstance and no mitigating circumstances. Specifically, the judge found that the murder was committed in an especially cruel, heinous, or depraved manner. The judge also sentenced Beaty to a consecutive twenty-eight-year term for sexual assault.

The court clerk automatically filed Beaty's notice of appeal to the Arizona Supreme Court. While his appeal was pending, Beaty filed a petition for post-conviction relief with Arizona Superior Court. The Superior Court denied the petition, and Beaty petitioned for review with the Arizona Supreme Court. The Arizona Supreme Court consolidated Beaty's direct appeal and petition for review and, on May 5, 1988, denied him any relief. *See State v. Beaty*, 762 P.2d 519 (Ariz. 1988).

On May 20, 1988, Beaty filed a second petition for postconviction relief, which the Superior Court dismissed; Beaty did not seek appellate review. On October 25, 1990, Beaty filed a third petition, which the Superior Court denied. Beaty sought to file a supplemental petition, but the Superior Court denied it as untimely. Beaty filed a petition for review, which the Arizona Supreme Court summarily denied on September 25, 1991. On February 6, 1992, Beaty

filed a fourth petition.

The Superior Court denied the petition, and Beaty did not seek appellate review.

On November 6, 1992, Beaty filed a § 2254 petition with the district court. The district court denied the petition on November 24, 1999, without conducting an evidentiary hearing. The court denied some of the claims on the merits and others as procedurally defaulted.

Beaty filed a timely notice of appeal. Beaty also filed a motion with the district court requesting a certificate of appealability ("COA") on several issues. The district court granted a certificate of probable cause ("CPC") instead of a COA.

## II

[1] Beaty filed his § 2254 petition in November 1992, well before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Accordingly, our review is generally governed by pre-AEDPA standards. *See, e.g., Lindh v. Murphy*, 521 U.S. 320, 326 (1997); *Karis v. Calderon*, 283 F.3d 1117, 1126 n.1 (9th Cir. 2002).

[2] However, AEDPA's COA requirement is applicable to Beaty's appeal. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Prior to AEDPA, a petitioner had to obtain a CPC in order to appeal the denial of a habeas petition. *See, e.g., Barefoot v. Estelle*, 463 U.S. 880, 892-93 (1983). To obtain a CPC, a petitioner had to make a "substantial showing of the denial of a federal right." *Greenawalt v. Stewart*, 105 F.3d 1268, 1273 (9th Cir. 1997) (per curiam) (internal quotation marks omitted). If the petitioner made such a showing as to at least one issue, he could appeal all of the issues in the petition. *See, e.g., Odle v. Woodford*, 238 F.3d 1084, 1086 n.2 (9th Cir.), *cert. denied*, 122 S. Ct. 201 (2001).

[3] Under AEDPA, a petitioner must obtain a COA rather than

a CPC. *See* 28 U.S.C. § 2253(c). Unlike a CPC, a COA 12741 BEATY v. STEWART is granted on a claim-by-claim basis. *See, e.g., Hiivala v. Wood*, 195 F.3d 1098, 1103 (9th Cir. 1999) (per curiam). A petitioner must make a substantial showing of the denial of a constitutional right as to *each issue* he wishes to appeal. *See* § 2253(c); *see also Karis*, 283 F.3d at 1126. A "substantial showing" includes demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484. Courts of Appeals lack jurisdiction to resolve the merits of any claim for which a COA is not granted. *See, e.g., Pizzuto v. Arave*, 280 F.3d 949, 951 (9th Cir. 2002).

**[4]** Beaty requested a COA, but the district court issued a CPC instead. The court relied upon *Fuller v. Roe*, 182 F.3d 699, 702-03 (9th Cir. 1999) (per curiam), which held that AEDPA's COA requirement does not apply to petitions that were filed before AEDPA's effective date. After the district court's decision, the Supreme Court decided *Slack v. McDaniel*, 529 U.S. 473, 482 (2000), which overruled *Fuller* and held that the COA requirement applies to all appeals filed after AEDPA's effective date, even if the petition itself was filed pre-AEDPA.

**[5]** However, *Slack* also held that a court should treat apetitioner's notice of appeal as a request for a COA for those issues raised in the opening brief. *Id.* at 483; *Cooper v. Calderon*, 255 F.3d 1104, 1107 (9th Cir. 2001); *see also* Ninth Circuit Rule 22-1(c). Therefore, we proceed to consider whether Beaty is entitled to a COA for each of the several issues that he has raised.

We first take up the claims decided by the district court on the merits, except those that concern the admission of Beaty's confession. Next, we consider the claims that the district court determined were procedurally defaulted. Finally, we take up Beaty's claims concerning the admission of his confession.

## III

Beaty claims that his counsel rendered ineffective assistance in failing to pursue allegations of juror misconduct. During trial, Beaty's counsel, Michael Miller,[3] allegedly received a phone call from co-workers of juror Fred Raggett. The co-workers claimed that Raggett had told them that he was going to "get Beaty." Miller promptly notified the court.

With counsel present, the court questioned Raggett in chambers. Raggett denied making any substantive comments about the trial. Miller thereupon requested a full evidentiary hearing. In particular, Miller professed that two persons were prepared to testify about Raggett's statements. However, the court asked to see affidavits from the two persons before scheduling a full evidentiary hearing.

Miller never submitted the affidavits, and the trial proceeded. After the jury returned its verdict, Miller moved for a new trial, renewing his argument that Raggett had engaged in juror misconduct. Miller did not include any affidavits with his motion, and the court denied it.

Beaty now seeks an evidentiary hearing as to whether Miller rendered ineffective assistance in failing to pursue this matter at trial. Beaty is entitled to an evidentiary hearing if he has asserted a colorable claim for relief because he has never had the opportunity to develop a factual record on this claim. *See, e.g., Siripongs v. Calderon*, 35 F.3d 1308, 1310 (9th Cir. 1994). Based on the record before us, Beaty has not presented a colorable claim that Miller's misconduct fell below an objective tandard of reasonableness. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 688 (1984); *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989). Certainly, a reasonable attorney might have abandoned a full evidentiary hearing in light of Raggett's denial. Indeed, a full evidentiary hearing risked alienating Raggett and his

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[3] As a sidenote, Miller was later convicted of money-laundering drug funds and operating a prostitution ring. Needless to say, he was disbarred.

fellow jurors. *See, e.g., United States v. Youts*, 229 F.3d 1312, 1320 (10th Cir. 2000) (concluding that counsel was not ineffective in failing to pursue juror misconduct allegations due to the concern that "singling out the juror by calling him before the judge for a separate inquiry might alienate or inflame him"); *United States v. Edwards*, 823 F.2d 111, 117 (5th Cir. 1987) (explaining that counsel often forgo pursuing claims of juror misconduct out of concern of alienating the jury). The decision not to pursue an evidentiary hearing was well within the bounds of reasonable trial tactics. We therefore deny a COA on the ineffective assistance claim involving juror misconduct.

## IV

Beaty claims that his due process rights were violated by the admission of phosphoglucomutase ("PGM") test results.[4] The state took a blood sample from Beaty and used a portion of the sample to conduct a PGM analysis. The state did not preserve the slides containing the blood sample, nor did it photograph them. Beaty claims that without the slides or photographs of them, he was unable to defend effectively against the admission of the state's PGM test results.

However, as the Arizona Supreme Court noted, Beaty was given a portion of the blood sample used in the state's PGM analysis. *Beaty*, 762 P.2d at 528. Accordingly, Beaty had the opportunity to conduct an independent PGM analysis and to counter the state's test results. Beaty's due process rights were not violated. *See, e.g., California v. Trombetta*, 467 U.S. 479, 488 (1984); *United States v. Hernandez*, 109 F.3d 1450, 1455 (9th Cir. 1997) (per curiam). We therefore deny a COA on the due process blood sample claim.

## V

Beaty contends that the state trial court impermissibly considered victim impact statements at sentencing in violation of the Sixth Amendment right to confrontation, the Eighth Amendment, and

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[4] PGM is an enzyme found in blood and semen.

due process. Under Arizona law, the judge, and not the jury, determines the penalty in a capital case. *See* Ariz. Rev. Stat. § 13-703(C). At sentencing, the judge received nineteen letters from Fornoff's friends and family and fifty-three letters from the community at large. Almost all of the letters urged a death sentence.

Victim impact statements are admissible at sentencing unless their admission would be "so unduly prejudicial that it renders the sentence fundamentally unfair." *Gretzler v. Stewart*, 112 F.3d 992, 1009 (9th Cir. 1997); *see also Payne v. Tennessee*, 501 U.S. 808, 827 (1991). When a judge, as opposed to the jury, reviews victim impact statements, we presume that the judge properly applied the law and considered only the evidence he knew to be admissible. *Gretzler*, 112 F.3d at 1009; *see also Arizona v. Walton*, 497 U.S. 639, 653 (1990), *overruled on other grounds by Ring v. Arizona*, 122 S. Ct. 2248 (2002). In this case, there is no evidence that the trial judge considered the victim impact statements improperly in imposing a death sentence. We therefore deny a COA on the victim impact statement claim.

## VI

Beaty challenges his consecutive sentences for first-degree murder and sexual assault because the crimes were committed during a "single spree." Beaty contends, as he did with the Arizona Supreme Court, that the trial court improperly imposed consecutive sentences in violation of Arizona law. However, state claims are not cognizable in federal habeas proceedings. *See, e.g., Miller v. Vasquez*, 868 F.2d 1116, 1118-19 (9th Cir. 1989). Accordingly, we must deny a COA on the consecutive-sentences claim.

## VII

Beaty contends that there is insufficient evidence supporting the aggravating circumstance that the murder was committed in an especially cruel, heinous, or depraved manner. *See* Ariz. Rev. Stat. § 13-703(G)(6) (formerly § 13-703(F)(6)). The presence of any of the three factors is an aggravating circumstance. *See, e.g., State v. Canez*,

42 P.3d 564, 591 (Ariz. 2002).

Cruelty concerns the mental and physical anguish suffered by the victim. *See, e.g., State v. Lopez*, 786 P.2d 959, 965 (Ariz. 1990). As the Arizona Supreme Court observed:

> [T]he evidence showed that there was the presence of vomit in the girl's mouth. Surely the process of holding the victim against her will, clamping a hand over her mouth to muffle her screams, thus causing her to vomit reflects the terror and horror that must have been present in the victim's mind.

*Beaty*, 762 P.2d at 529.

Certainly, a rational factfinder could find that the murder was especially cruel. *See Lewis v. Jeffers*, 497 U.S. 764, 783 (1990). Therefore, there is no need to consider whether there is sufficient evidence that the murder was committed in an especially heinous or depraved manner. *See, e.g., Canez*, 42 P.3d at 591. We therefore deny a COA on the aggravating circumstances insufficiency of the evidence claim.

## VIII

Alternatively, Beaty claims that the trial judge impermissibly failed to apply a "beyond a reasonable doubt" standard in finding the aggravating circumstance. Arizona law requires a trial judge to find aggravating circumstances beyond a reasonable doubt. *See, e.g., State v. Jordan*, 614 P.2d 825, 828 (Ariz. 1980). In this case, the trial judge neglected to mention the burden of proof in finding the aggravating circumstance. We need not decide whether the federal Constitution requires aggravating circumstances to be found beyond a reasonable doubt. *See, e.g., Woratzeck v. Stewart*, 97 F.3d 329, 335 (9th Cir. 1996) (expressly leaving this question open). "Trial judges are presumed to know the law and to apply it in making their decisions." *Walton*, 497 U.S. at 653, *overruled on other grounds by Ring v. Arizona*, ___ S. Ct. ___ (2002). *See also Gretzler*, 112 F.3d at 1008. Beaty has failed to muster any evidence rebutting the presumption that the trial court

applied the correct burden of proof. We therefore deny a COA on the burden of proof claim.

## IX

Next, we consider the claims the district court determined were procedurally defaulted. As a preliminary matter, Beaty contends that none of his claims is procedurally defaulted because the Arizona courts conducted an independent review of the record for error.

Section 2254 petitioners must exhaust their federal claims before seeking habeas corpus relief. *See* 28 U.S.C. § 2254(b)(1)(A). Petitioners must fairly present their federal claims to the highest state court in order to give the "State the opportunity to pass upon and to correct alleged violations of its prisoners' federal rights." *Duncan v. Henry*, 513 U.S. 364, 365, (1995) (internal quotation marks omitted). Unexhausted claims may be procedurally defaulted. *See, e.g., Reese v. Baldwin*, 282 F.3d 1184, 1190 (9th Cir. 2002). A claim is procedurally defaulted "if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991). If Beaty has any unexhausted claims, he has procedurally defaulted them, because he is now time-barred under Arizona law from going back to state court. *See* Ariz. R. Crim. P. 32.2(a); *see also Stewart v. Smith*, ___ S. Ct. ___ (2002) (holding that Rule 32.2(a) is an adequate and independent procedural bar).[5]

Properly exhausted claims may also be procedurally defaulted. If a state court determines that a claim is procedurally barred, we are precluded from reviewing the merits of the claim if the procedural bar is adequate and independent. *See, e.g., Coleman* 501 U.S. at 749-50. Nonetheless, we will review the merits if the petitioner can show cause and prejudice or, alternatively, a fundamental miscarriage of justice.

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[5] Beaty does not contend that any of the rules's codified exceptions are applicable. *See Stewart v. Smith*, 46 P.3d 1067, 1071 (Ariz. 2002).

*See, e.g., Moran v. McDaniel*, 80 F.3d 1261, 1269 (9th Cir. 1996).

At the time of Beaty's direct appeal, the Arizona Supreme Court was charged by statute to review the record independently in all criminal cases for fundamental error. *See* Ariz. Rev. Stat. § 13-4035(B) (repealed 1995); *State v. Yslas*, 676 P.2d 1118, 1121 (1984). As such, Beaty contends that the Arizona Supreme Court implicitly reviewed all of his potential federal claims on direct review. Therefore, he argues that all of his claims are properly exhausted and not procedurally defaulted. However, we rejected the identical argument in *Poland v. Stewart*, 117 F.3d 1094, 1105 (9th Cir. 1997), in which we held that Arizona's fundamental error review does not excuse a petitioner's failure to raise his federal claims with the Arizona Supreme Court.

Beaty also stresses that Arizona courts independently review the record in capital cases to determine "the presence or absence of aggravating and mitigating circumstances." *State v. Bishop*, 622 P.2d 478, 480 (Ariz. 1980) (citing *State v. Richmond*, 560 P.2d 41 (Ariz. 1976).[6] The district court declined to address this argument because Beaty failed to raise it until his motion for reconsideration. *See, e.g., United States v. Navarro*, 160 F.3d 1254, 1256 (9th Cir. 1998). In any event, Beaty's unexhausted and procedurally barred claims do not concern the existence of an aggravating or mitigating circumstance. Therefore, there is no need to decide whether Arizona's independent review of the record excuses exhaustion or procedural default. The district court properly rejected Beaty's arguments that his procedural default was generally excused.

## X

Beaty claims that trial counsel rendered ineffective assistance of counsel in failing to introduce mitigating evidence at sentencing. Beaty also claims that trial counsel did not adequately prepare for the sentencing phase and that counsel should have requested a mental evaluation of Beaty for sentencing purposes. Finally, Beaty claims that

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[6] This principle was later codified at Ariz. Rev. Stat. § 13-703.01.

his appellate counsel rendered ineffective assistance in failing to raise trial counsel's ineffective assistance at the sentencing.

Beaty first raised these claims in a supplemental petition to his third petition for post-conviction relief. The Superior Court denied the supplemental petition as untimely because Beaty filed it six days after a court-imposed deadline. *See* Ariz. R. Crim. P. 32.6(d) (1991). Beaty filed a petition for review, which the Arizona Supreme Court summarily denied.

Beaty procedurally defaulted the claims raised in the supplemental petition. *See, e.g., Reese*, 282 F.3d at 1190-91. Beaty has not shown that Arizona's time bar is not adequate or independent, or that its application would result in a fundamental miscarriage of justice. We therefore deny a COA on his sentencing claims.

**XI**

Beaty asserts several ineffective assistance claims that were raised in his fourth petition for post-conviction relief: Beaty contends he received ineffective assistance due to his trial counsel's (1) alleged substance abuse and other personal problems, (2) failure to request certain jury instructions regarding O'Connor's testimony, (3) failure to request a mental evaluation of Beaty for sentencing, (4) neglect in introducing mitigating evidence during sentencing, (5) failure to share the presentence report with him, (6) inappropriate comments to the media, and due to his appellate counsel's (7) failure to investigate the case adequately or to raise meritorious claims on appeal.

The Superior Court held that these seven claims were procedurally barred because they were not raised on direct review or in Beaty's first petition for post-conviction relief. The sentencing claims were indeed raised in the supplemental petition to the third petition and, as discussed above, are procedurally defaulted. The other claims are unexhausted and defaulted because Beaty did not petition for review after the Superior Court denied the fourth petition. *See, e.g., Reese*, 282 F.3d at 1190-91. We deny a COA on the ineffective assistance claims

raised in Beaty's fourth petition for postconviction relief.

## XII

Beaty argues that the admission of his confession was in violation of his due process right to "confidential communications." In his direct appeal, Beaty claimed that the admission of O'Connor's testimony violated Arizona's physician-patient privilege. The state argued that Beaty's confession fell within an exception to the privilege that requires physicians to report incidents of sexual abuse. In his reply brief to the Arizona Supreme Court, Beaty argued that the state's interpretation of the scope of the physician-patient privilege would implicate due process concerns in *other cases*. Specifically, Beaty argued:

> As a final observation on the subject of the physician-patient privilege, Beaty would note that the arguments set forth by the State would, if carried to their logical extreme, present tremendous due process problems, particularly for child molest [sic] defendants incompetent to stand trial. In these cases, in the absence of physician-patient privilege, no lawyer could have [the] client's competence or sanity evaluated under [Arizona's competency procedures] without exposing his client to the risk that all statements made to the examining physician would be required to be reported to the prosecution. . . . . While *Beaty's case clearly does not involve questions of confidence* or an insanity defense, the broad abrogation of the physician-patient privilege urged by the State would cause grave problems in this area.

(Emphasis added.). Beaty never argued that *his* confession was obtained in violation of any due process right to confidentiality. Rather, he argued that a broad abrogation of the physician-patient privilege might implicate due process concerns in other cases, in particular where a defendant undergoes a competency examination. Beaty did not fairly present his due process claim to the Arizona courts. *See, e.g., Reese*, 282 F.3d at 1190-91. We therefore deny a COA on his claim that the

admission of his confession violated due process.

## XIII

Beaty claims that his appellate counsel labored under a conflict of interest that adversely affected his performance. After Beaty's arrest, the court appointed Mary Wisdom of the Maricopa County Office of the Public Defender to represent him. Wisdom moved to withdraw on the basis of a conflict of interest before the start of the first trial. The court conducted an *in camera* hearing, granted Wisdom's motion, and appointed Miller. The state trial record does not reveal the nature of the conflict. The trial judge later appointed Edward McGee of the same public defender's office to represent Beaty on direct appeal. In his third post-conviction petition, Beaty claimed that McGee labored under a conflict of interest. In the event Beaty secured a new trial, he intended to call Wisdom as a witness. He expected that Wisdom would testify that the trial testimony of several of the state's witnesses was inconsistent with pretrial statements made to the defense. According to Beaty, McGee labored under a conflict because he hoped to secure a trial in which his colleague likely would be a witness. The Superior Court denied relief, and the Arizona Supreme Court summarily denied his petition for review.

In his § 2254 petition, Beaty alleges that McGee labored under a conflict of interest. However, Beaty's characterization of McGee's conflict is vastly different from what he presented to the Arizona state courts. Wisdom apparently moved to withdraw because the public defender's office had represented a tenant, who lived in the same apartment complex as Beaty's, on child molestation charges in 1977. Wisdom did not feel she could represent Beaty because a potential defense was to implicate the tenant as an alternative suspect.

According to McGee, he contacted Miller before representing Beaty on appeal. McGee claims Miller told him that he made a tactical decision not to implicate the tenant. Because the defense was not used at trial, McGee thought the public defender's office no longer had a conflict.

According to Beaty, Miller was not aware of the tenant's criminal history. Beaty maintains that McGee labored under a conflict because he was inhibited from arguing that Miller was ineffective in not implicating the tenant. In other words, McGee could not implicate the tenant because the public defender's office had represented the tenant on child molestation charges. Beaty maintains that he is at the very least entitled to an evidentiary hearing on this claim.

However, Beaty did not fairly present this version of his conflict of interest claim to the Arizona state courts. While new factual allegations do not ordinarily render a claim unexhausted, a petitioner may not "fundamentally alter the legal claim already considered by the state courts." *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986). *See also Chacon v. Wood*, 36 F.3d 1459, 1468 (9th Cir. 1994). Beaty's claim raised in state court is altogether different from the claim asserted in his petition. We therefore deny a COA on his conflict of interest claim.[7]

## XIV

Beaty claims that his trial counsel further rendered ineffective assistance of counsel in failing (1) to call potential alibi witnesses, (2) to object to certain parts of O'Connor's testimony, (3) and to call Beaty to testify about O'Connor's testimony. Beaty also asserts various challenges to the constitutionality of Arizona's capital punishment scheme. Beaty concedes that he did not raise these claims in state court. Accordingly, the claims are unexhausted and procedurally defaulted. *See, e.g., Reese*, 282 F.3d at 1190-91. We therefore deny a COA as to these defaulted ineffective assistance of counsel claims.

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[7] Beaty appears to have abandoned his claim raised in state court that McGee labored under a conflict because he hoped to secure a new trial in which Wisdom likely would be a witness. In any event, Beaty's claim is without merit. Beaty has not shown that McGee labored under an "actual conflict." Specifically, Beaty has not demonstrated how these circumstances inhibited McGee from zealously advocating the award of a new trial. *See, e.g., Mickens v. Taylor*, 122 S. Ct. 1237, 1243 (2002); *Bonin v. Calderon*, 59 F.3d 815, 826 (9th Cir. 1995).

Beaty also argues that the district court did not afford him an adequate opportunity to show cause and prejudice to excuse procedural default. In its summary judgment motion, the state argued that several of Beaty's claims were procedurally defaulted. In his opposition and cross-motion for summary judgment, Beaty argued that his procedural default was excused because Arizona courts conduct an independent review of the record for error. Beaty did not argue cause and prejudice. Indeed, he specifically stated, "Petitioner does not need to show cause and prejudice." Beaty filed a motion for evidentiary hearing along with his opposition and cross-motion for summary judgment.

After briefing on the summary judgment motions was completed, the district court issued an order deferring ruling on Beaty's motion for an evidentiary hearing. The court stated: "After the Court has ruled on whether any of Petitioner's claims are procedurally defaulted *and after submitting any cause and prejudice briefs, if needed*, the Court will review the matter and determine whether a formal hearing is required . . . ." (emphasis added).

The court later granted the state's motion for summary judgment, concluding that several of Beaty's claims were procedurally defaulted. Beaty moved for a new trial, arguing that he could show cause and prejudice. The court rejected Beaty's attempt as belated.

Beaty contends that he relied on the evidentiary hearing order, which suggested that the court would entertain cause and prejudice briefs. We are not persuaded. By the time the district court had issued the order, Beaty had opposed summary judgment solely on the ground that Arizona's independent review of the record excused his default. In his motion, he expressly disclaimed any reliance upon cause and prejudice. We are satisfied that the district court did not err in denying Beaty's belated attempt to argue cause and prejudice. *See, e.g., Navarro*, 160 F.3d at 1256; *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985).

## XVI

We now take up Beaty's claims concerning his confession that the district court considered on the merits.

### A

First, Beaty argues that he was entitled to *Miranda* warnings prior to his confession. To be entitled to such warnings, two factors must be established: custody and interrogation. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). The facts developed at the state admissibility hearing clearly support the Arizona Supreme Court's finding that Beaty's confession did not result from "interrogation," but was, instead, spontaneous. *See Beaty*, 762 P.2d at 528. O'Connor testified that he was "not questioning Mr. Beaty particularly. It [was] casual." Indeed, Beaty made the statement after the session had ended, and O'Connor testified that it came "more or less out of the blue" and was "somewhat shock[ing]." We are firmly convinced that O'Connor neither questioned Beaty nor engaged in the functional equivalent.[8] We therefore do not reach the question of whether Beaty was in custody at the time of confession and deny a COA on the *Miranda* claim.

### B

**[6]** Beaty further claims that the admission of O'Connor's testimony violates his Sixth Amendment right to counsel. The Sixth Amendment right to counsel attaches at the initiation of adversary judicial criminal proceedings. *See, e.g., United States v. Harrison*, 213 F.3d 1206, 1209 (9th Cir. 2000). Once the right to counsel has attached, the state may not take actions "designed deliberately to elicit

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[8] While Beaty contends that he is entitled to an evidentiary hearing, he has not shown with any specificity that the factual record is inadequately developed to assess whether he was interrogated. *See, e.g., Phillips v. Woodford*, 267 F.3d 966, 972 (9th Cir. 2001) (holding that an evidentiary hearing is not required when the petitioner relies solely upon "conclusory, unsworn statements unsupported by any proof or offer or proof").

incriminating remarks." *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986). *See also Cahill v. Rushen*, 678 F.2d 791, 793 (9th Cir. 1982). This inquiry is objective and does not focus on the subjective intentions of the state officer. *See United States v. Harris*, 738 F.2d 1068, 1071 (9th Cir. 1984).

**[7]** The factual record clearly reveals that the group sessions were not deliberately designed to elicit incriminating remarks. The purpose of the group was to explore interaction between male and female inmates. The group was not organized to collect incriminating information to be used at trial. *See Brooks v. Kincheloe*, 848 F.2d 940, 945 (9th Cir. 1988). The Sixth Amendment is violated only by deliberate action, not "whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached." *Kuhlmann*, 477 U.S. at 459.[9]

**[8]** Alternatively, Beaty argues that his confession occurred during a "critical stage." Once the right to counsel has attached, a defendant has the right to have counsel present for all "critical stages of the prosecution." *United States v. Akins*, 276 F.3d 1141, 1146 (9th Cir. 2002). A "critical stage" is a "trial-like confrontation," *United States v. Montgomery*, 150 F.3d 983, 994 (9th Cir. 1998), in which "potential substantial prejudice to [the] defendant's rights inheres" and in which counsel may help avoid that prejudice, *United States v. Wade*, 388 U.S. 218, 227 (1967). Examples of critical stages include post-indictment police lineups, *id.*, arraignment, *Hamilton v. Alabama*, 368 U.S. 52, 53, (1961), and sentencing, *Gardner v. Florida*, 430 U.S. 349, 358 (1977).

**[9]** We have little trouble concluding that Beaty's confession did not occur during a "critical stage." The group sessions were not court-ordered and were not designed to acquire information to be used at trial. *See Estelle v. Smith*, 451 U.S. 454 (1981) (holding that Sixth Amendment was violated by admissions made to state psychiatrist

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[9] While Beaty did not receive an evidentiary hearing on this claim, he has not shown with any specificity that the factual record is not fully developed on this issue. *See Phillips*, 267 F.3d at 972.

because the court ordered the sessions to determine competency). In short, the sessions were not a "trial-like confrontation." We therefore deny a COA on the claim that the admission of the confession violates the Sixth Amendment.

## C

**[10]** Finally, Beaty claims that his confession was involuntary under the Fifth Amendment. The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, commands that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. *See also Malloy v. Hogan*, 378 U.S. 1, 6 (1964). The Fifth Amendment protects against involuntary statements obtained by state coercion. *See, e.g., Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961). Voluntariness is considered in light of the totality of the circumstances. *See, e.g., Haynes v. Washington*, 373 U.S. 503, 513 (1963). Specifically, we consider whether "the government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne." *United States v. Leon Guerrero*, 847 F.2d 1363, 1366 (9th Cir. 1988). *See also Hutto v. Ross*, 429 U.S. 28, 30 (1976) (per curiam).

**[11]** Beaty primarily argues that his confession was involuntary because he signed a confidentiality agreement, which promised that "all group communication" would be kept confidential. In particular, Beaty claims that *Pens v. Bail*, 902 F.2d 1464 (9th Cir. 1990) (per curiam) presents materially identical circumstances. In *Pens*, the petitioner was convicted of rape and committed to the custody of a state hospital for "sexual pschopath treatment." *Id.* at 1465. The petitioner was required to divulge his past sexual history as part of the program. However, the hospital promised that any information disclosed during treatment would remain confidential. The petitioner confessed to new sex crimes during treatment, which the hospital disclosed to the court. The court thereafter sentenced the petitioner to an extended period of imprisonment, in part because of the petitioner's confessions of past criminal sexual activity. We held that the petitioner's confessions were obtained involuntarily because he was required to divulge his past

criminal history under the promise that any disclosures would remain confidential. *Id.* at 1465-66. *Pens* is consistent with several decisions from our court, as well as our sister circuits. *See, e.g., United States v. Walton*, 10 F.3d 1024, 1031 (3d Cir. 1993) (holding that the defendant's statement was involuntary because federal officer made a direct promise of confidentiality); *United States v. Harrington*, 923 F.2d 1371, 1377 (9th Cir. 1991) (holding that the defendant's statement was involuntary because it was made during a court ordered mental examination and a state statute provided that such statements would remain confidential); *United States v. Robinson*, 439 F.2d 553, 560 (D.C. Cir. 1970) (holding involuntary a confession obtained by prison psychologist because the defendant reasonably understood that his communications would remain confidential).

The state argues that *Pens* is inapposite because Beaty's statements did not fall within the scope of the confidentiality agreement. The agreement stated that "*group communication* is confidential and therefore *group business* cannot be discussed outside of group." (emphasis added). The state argues that Beaty's confession did not concern "group communication" or "business" because the statements were unrelated to the topic of group discussion. *See Beaty*, 762 P.2d at 528 ("The defendant's inculpatory statements were not regarding group business . . . ."). Alternatively, the state asserts that the agreement did not cover Beaty's confession because he confessed after the group session had formally ended. *See id.* ("The defendant's inculpatory statements were not . . . given during the group session.").

**[12]** The critical question before us is whether Beaty reasonably believed that his statements were protected by the state's confidentiality agreement. *See, e.g., Walton*, 10 F.3d at 1029; *United States v. Cahill*, 920 F.2d 421, 427 (7th Cir. 1990); *Hawkins v. Lynaugh*, 844 F.2d 1132, 1139 (5th Cir. 1988); *United States v. Shears*, 762 F.2d 397, 402 (4th Cir. 1985). However, the factual record is not adequately developed for us to assess this question with any confidence. We must therefore remand to the district court for an evidentiary hearing to determine the reasonableness of Beaty's asserted belief that his statements were protected by the terms of the agreement, taking into account the

circumstances surrounding Beaty's statements to O'Connor and the group discussion preceding this encounter.

The state, however, contends that Beaty had an opportunity to develop the factual record in state court and therefore may not obtain an evidentiary hearing without a showing of cause and prejudice. *See, e.g., Keeney v. Tamayo-Reyes*, 504 U.S. 1, 7-8 (1992). The pre-AEDPA standard for obtaining an evidentiary hearing is a "reasonably low threshold for habeas petitioners to meet." *Phillips*, 267 F.3d at 973. A petitioner is entitled to an evidentiary hearing if he asserts a colorable claim and a state court did not offer a "full and fair hearing" on the claim. *Townsend v. Sain*, 372 U.S. 293, 313 (1963); *see also Phillips*, 267 F.3d at 973.

The state trial court conducted an evidentiary hearing as to the admissibility of Beaty's confession. However, at the beginning of the hearing, the judge seemed to limit the scope of the hearing to the question whether the confession fell within Arizona's physician-patient privilege. As the prosecutor was exploring the initial contact O'Connor had with Beaty, the judge interrupted, saying,

> I think maybe we're wasting a lot of time, because I think . . . probably the primary controlling issue I think we ought to resolve first is the applicability or inapplicability of [the privilege] . . . . If I rule that . . . there is no privilege, then it doesn't make any difference what the practical background is.

At the conclusion of the hearing, the judge ruled that the privilege was inapplicable, but failed to address Beaty's contention that the statement was involuntary.[10] Under these circumstances, we are left with a genuine doubt whether the state court afforded Beaty an adequate

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[10] The record is clear that Beaty indeed raised a Fifth Amendment involuntariness claim at the hearing. While Beaty's motion in limine focused n the state privilege issue, Beaty expressly adopted the arguments made by Dr. O'Connor, who was represented by separate counsel. Dr. O'Connor opposed testifying on the ground that the confession was obtained involuntarily under the Fifth Amendment.

opportunity to explore the factual underpinnings of his Fifth Amendment claim. *See, e.g., Townsend*, 372 U.S. at 313; *Rhoden v. Rowland*, 10 F.3d 1457, 1460 (9th Cir. 1993). Notably, the facts relevant to whether the confession falls within Arizona's physician patient privilege are not necessarily the same as the facts relevant to his Fifth Amendment claim.

In light of the grave consequences at stake, we must conclude that an evidentiary hearing on this issue before the district court is necessary.[11] We also leave for the district court consideration of whether any error was prejudicial under *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).[12]

## XVII

**[13]** In conclusion, we deny a certificate of appealability on all claims except as to the voluntariness of Beaty's confession; we remand to the district court for an evidentiary hearing limited to such claim. Any appeal from the disposition of the evidentiary hearing shall be assigned to this panel.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

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[11] While Beaty primarily relies upon the confidentiality agreement, he also stresses that he was coerced by his fellow group members and that he was forced to participate in the sessions. In light of our remand, we decline to address these arguments at this time.

[12] Beaty argues that Arizona's capital sentencing scheme is unconstitutional under the rule announced in *Arizona v. Ring*, 122 S. Ct. 2248 (2002). This court has not yet decided whether *Ring* applies retroactively to habeas proceedings. We need not decide that question here because we are remanding for an evidentiary hearing concerning the voluntariness of Beaty's confession, which was admitted at the guilt phase of the trial. Thus, we may not need to reach the *Ring* question. However, if Beaty does not prevail on remand, the *Ring* issue is preserved for our future consideration.

## APPENDIX B

[Filed November 24, 1999]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

| | |
|---|---|
| DONALD EDWARD BEATY, Petitioner, vs. TERRY L. STEWART, et al., Respondents. | No. CIV 92-2076-PHX-RGS<br><br>JUDGMENT ORDER |

This action came on for consideration before the Court. The issues having been duly considered and a memorandum of decision and order having been duly rendered,

IT IS ORDERED AND ADJUDGED that Petitioner's Petition for Writ of Habeas Corpus and all amendments thereto is denied with prejudice, Respondents' Motion for Summary Judgment is granted, and the stay of execution previously imposed by this Court is vacated;

IT IS FURTHER ORDERED that the Clerk of Court enter judgment in accordance with this Order and send a copy of this Order to all counsel of record.

DATED this 24th day of November, 1999.

/s/
ROGER G. STRAND
United States District Judge

[Filed November 24, 1999]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

| | |
|---|---|
| DONALD EDWARD BEATY, Petitioner, vs. TERRY L. STEWART, et al., Respondents. | No. CIV 92-2076-PHX-RGS<br><br>MEMORANDUM OF DECISION AND ORDER |

Petitioner, Donald Edward Beaty, filed a Petition for Writ of Habeas Corpus alleging that he is imprisoned and sentenced to death in violation of the United States Constitution.[1] The Petition raises thirty-two claims. For the reasons stated herein the Court finds that Petitioner is not entitled to federal habeas relief.

## FACTUAL BACKGROUND

On May 9, 1984, Christy Ann Fornoff, a thirteen-year-old newscarrier for the Phoenix Gazette, was collecting her newspaper accounts at the Rock Point Apartments in Tempe. Christy's mother had accompanied her and waited outside the apartment complex while Christy went inside. When Christy did not return, the apartment complex was searched. Her collection book was discovered by a fence

1. Because Petitioner filed his habeas petition before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the provisions of the Act do not apply. Jeffries v. Wood, 114 F.3d 1484, 1495-96 (9th Cir. 1997) (en banc).

near the complex, but Christy was not located. Two days later, Donald Edward Beaty ("Petitioner"), the resident maintenance manager at the apartments, reported to the police that he had found the victim's body near a trash container in the parking lot. The body was wrapped in a white sheet.

The autopsy indicated that the victim lost consciousness due to asphyxiation and did not regain consciousness before she died. In addition, the victim had been sexually assaulted either contemporaneous with or shortly after death. Pubic hairs from Petitioner and fibers found in his apartment were consistent with pubic hairs and fibers found on the body and sheet. There was also a vomit-like substance on the victim's face which matched a similar substance found in Petitioner's apartment.

## PROCEDURAL BACKGROUND

Petitioner was tried for murder and sexual assault, but it ended with a mistrial on March 18, 1985, when the jury was unable to arrive at a unanimous verdict. Subsequently, it became known that Petitioner had confessed the murder to a psychiatrist at the jail. On May 8, 1985, Petitioner's second trial began. Over Petitioner's objection, the jail psychiatrist testified to Petitioner's confession. On June 20, 1985, Petitioner was convicted of first-degree murder and sexual assault. On July 22, 1985, following a presentence hearing, the trial judge imposed the death penalty for the murder, finding one aggravating circumstance and no mitigating circumstances. (M.E. 7/22/85.)[2]

On July 22, 1985, Petitioner's notice of appeal was automatically filed. (R.O.A. 331.) On April 14, 1986, Petitioner also filed a petition for post-conviction relief ("PCR"). (R.O.A. 338.) Petitioner's direct appeal was stayed pending the outcome of his post-conviction relief proceedings. The trial court denied relief. (M.E. 7/16/86.) The direct appeal and the appeal from the denial of post-conviction relief were

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2. "M.E." refers to minute entries of the state court. "R.O.A." refers to the state court record on appeal. "R.T." refers to the reporter's transcripts. "File doc." refers to documents in this Court's file.

then consolidated. The Arizona Supreme Court affirmed the convictions and sentences, holding, in part, that Petitioner's confession to the jail psychiatrist was not privileged. State v. Beaty, 158 Ariz. 232, 762 P.2d 519 (1988), cert. denied, 491 U.S. 910 (1989).

Petitioner filed a second PCR on May 20, 1988, Petitioner's stated purpose in filing the second PCR was to expand the factual record regarding issues he would raise in a motion for reconsideration with the Arizona Supreme Court. Because proceedings were still pending in the Arizona Supreme Court, the trial court held that it did not have jurisdiction to rule on the petition. (M.E. 7/21/88.) On November 1, 1988, the Arizona Supreme Court denied any reconsideration of its opinion.

On October 25, 1990, Petitioner, *pro se*, filed a third PCR. The trial court denied the petition, holding that "no material issue of fact or law exists which would entitle the defendant to relief." (M.E. 5/16/91.) On May 16, 1991, appointed counsel filed a supplemental petition, but the trial court rejected it as untimely. (M.E. 5/29/91.) On September 25, 1991, the Arizona Supreme Court denied the petition for review.

On February 6, 1992, Petitioner filed a fourth PCR. On February 28, 1992, he filed a supplemental petition. The trial court denied the petition, finding the claims presented procedurally defaulted. (M.E. 12/2/92.)[3] Petitioner did not file a petition for review with the Arizona Supreme Court.

On November 6, 1992, Petitioner filed in this Court a Petition for Writ of Habeas Corpus. He filed a Supplemental Petition ("Petition") on October 13, 1993. Respondents filed an Answer and a Motion for Summary Judgment. Petitioner filed a Response and Respondents filed a Reply.

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3. Although the trial court's minute entry refers to defendant's "third" PCR, it is the fourth PCR.

## CLAIMS DECIDED ON THE MERITS[4]

Claim 1: Whether the Admission of Petitioner's Confession at Trial Violated His Fifth Amendment Right Not to Incriminate Himself.

A. Whether Petitioner's Confession should have been Excluded at Trial Because He was Denied Constitutional Warnings Pursuant to Miranda v. Arizona, 384 U.S. 436 (1966).

Petitioner claims that he was entitled to Miranda warnings prior to confessing the murder to Dr. George O'Connor, a jail psychiatrist. Dr. O'Connor testified at petitioner's criminal trial regarding that confession. Respondents contend that Petitioner's Miranda claim is without merit due to an absence of both custody and interrogation. The Court agrees. Miranda warnings are required only where the facts and circumstances demonstrate custodial interrogation. Oregon v. Elstad, 470 U.S. 298, 309 (1985). As discussed below, the Court concludes that Petitioner's confession did not arise out of any custodial interrogation.

### (1) Relevant Factual Background.

The Arizona Supreme Court set forth the relevant facts it found. Beaty, 158 Ariz. 232, 762 P.2d 519. Its factual findings are entitled to a presumption of correctness so long as they are fairly supported in the record. 28 U.S.C. § 2254(d) (1992); Summner v. Mata, 449 U.S. 539 (1981). This Court has reviewed the applicable portions of the state court record.

Prior to trial, Petitioner, while housed at the main jail, was being harassed by other prisoners. Beaty, 158 Ariz. at 237, 762 P.2d at 524. Subsequently, Petitioner was transferred to the Durango jail, a hospital

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4. The discussion of procedurally barred claims appears infra at pages 55 to 77.

and psychiatric facility. The transfer was made to keep him safe from other prisoners and to give him a larger living area in which to exercise his foot which had recent surgery. Id.

At Durango, Dr. O'Connor asked Petitioner to participate in group therapy sessions because Petitioner's behavior at the Durango facility was "very juvenile" and he was making "very inappropriate gestures" to female inmates. (R.T. 5/31/85 at 20); Beaty, 158 Ariz. at 238, 762 P.2d at 525. These sessions, which were experimental, were run by Dr. O'Connor. Id. Petitioner participated in a group of five men and five women who met twice weekly. Id. Regarding the purpose of the group, Dr. O'Connor testified:

> Q. . . . [T]he primary reason for the group was you had men and women prisoners housed close to each other, and a lot of profanity was yelled back and forth and you were trying to keep the people from creating disturbances?
>
> A. Yes.
>
> Q. And the purpose of the group in that regard was then for some type of jail management to keep management and peace among the prisoners?
>
> A. Well, if I may be lengthy.
>
> Q. Sure.
>
> A. In the jail, most of the male inmates tend to become extremely lax in their attitudes, especially their behavior when they are around female staff members, personnel and other female inmates that they may meet going back and forth to Court. They can get quite vulgar and profane.
>
> It was our hope to experiment and see if we brought them into a closer proximity, closer contact, that they could then start

to have a feeling that, indeed, that was not simply a sex object over there but a human being, and become more respectful.

What we were hoping to show was that the consequence to that type of group activity, there would be a great assemblance of respect and dignity in our unit, and we were hoping to extrapolate that to the entire jail.

(R.T. 5/31/85 at 16-17.)

During one of the sessions, the group members accused Petitioner of being cold-blooded, which he denied. (R.T. 6/10/85 at 39.) After the session had ended, Petitioner waited to talk to Dr. O'Connor. Id. After waiting for a period between a few to 15 minutes, Petitioner spoke with Dr. O'Connor. Beaty, 158 Ariz. at 239, 762 P.2d at 526; R.T. 5/31/85 at 21. It was at this time that Petitioner blurted out his confession to Dr. O'Connor, as follows:

Q: In reference to [Petitioner's] statements is this something that you asked him to tell you or is this something that he just came out with on his own?

A: This was unsolicited, it was a statement that he volunteered to make.

Q: Tell me what [Petitioner] said to you.

A: . . . That [Petitioner] approached me and said that he did not feel that he was the terrible thing that people, meaning the group members, had accused him of being; that he did not mean to kill the little Fornoff girl; that she had become rather loud, I believe implicated [sic] that her mom was just outside or downstairs and that he then motioned as if to show me that he went to muffle her, keep her from screaming by muffling her by putting his hand over her face.

Beaty, 158 Ariz. at 239, 762 P.2d at 526; (R.T. 6/10/85 at 30-31.) Dr. O'Connor testified that when Petitioner made his confession, they were in a multi-purpose room, which was a very large center area, like an atrium. Beaty, 158 Ariz. at 239, 762 P.2d at 526; R.T. 5/31/85 at 21. Dr. O'Connor also testified that there were other persons in the room at the time that Petitioner confessed. (R.T. 5/31/85 at 21.) These other persons included detention guards and other group therapy session participants. Id.

(2) Custody Within the Prison Context.

Custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda, 384 U.S. at 444. In Miranda, the Supreme Court instituted the requirement of warnings for one who is in custody and interrogated by law enforcement officers about matters that might tend to incriminate him. Id. at 479.

In Mathis v. United States, 391 U.S. 1 (1968), the Supreme Court held that, under certain circumstances, Miranda v. Arizona may not be applicable in a prison context. Following and construing Mathis, the Ninth Circuit in Cervantes v. Walker, 589 F.2d 424, 428 (9th Cir. 1978) and United States v. Turner, 28 F.3d 981 (9th Cir. 1994), cert. denied, 115 S. Ct. 1117 (1995), ruled that Mathis did not create a per se rule that a prisoner is in "custody" for Miranda purposes simply because the defendant is in prison. Turner, 28 F.3d at 983.

In Cervantes, the Ninth Circuit held that Miranda warnings are required where a prisoner is questioned by a government agent, not himself a member of the prison staff, on a matter not under investigation within the prison itself because such questioning is an additional imposition on the prisoner's limited freedom of movement. Cervantes, 589 F.2d at 428. In a prison setting, therefore, in order for Miranda warnings to be necessary there must be some act which places further limitations on the prisoner. Turner, 28 F.3d at 983 (citing

Cervantes). Cervantes identified the following considerations to evaluate the determination as to custody:

> the language used to summon the individual, the physical surroundings of the interrogation, the extent to which he is confronted with evidence of his guilt, and the additional pressure exerted to detain him . . . to determine whether a reasonable person would believe there had been a restriction of his freedom over and above that in his normal prison setting.

Cervantes, 589 F.2d at 428.

(3) Interrogation.

Interrogation, for Miranda purposes, means express questioning on the subject or its functional equivalent, which is any statement or action by the interrogator that is likely to elicit an incriminating response. Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980). Interrogation, whether by express questioning or its functional equivalent, must reflect a measure of compulsion above and beyond that inherent in custody itself. Id. at 300. In Rhode Island v. Innis, the Supreme Court focused on the meaning of the "functional equivalent" of questioning. The Court stated that the functional equivalent of interrogation can extend to words or actions on the part of police officers that they should have known were reasonable likely to elicit an incriminating response. Id. at 301.

An incriminating statement is the product of custodial interrogation when an objective observer with the same knowledge concerning the suspect as that of the police officer would conclude that the officer's remark or conduct was reasonably likely to elicit an incriminating response. United States v. Moreno-Flores, 33 F.3d 1164, 1169 (9th Cir. 1994). However, as recognized in Miranda, spontaneous statements or statements volunteered by an accused are not inadmissible simply because they are made without formal Miranda warnings. Miranda, 384 U.S. at 478; see also United States v. Sherwood, 98 F.3d 402, 409 (9th Cir. 1996).

(4) Discussion

The determination of whether a person is in custody and entitled to Miranda warnings is a mixed question of law and fact, Thompson v. Keohane, 516 U.S. 99, 102 (1995). Once the historical facts are resolved, the federal habeas court is to make the ultimate determination on the issue of custody. Id. at 115.

Petitioner contends that the mere fact of prison confinement is dispositive of the question of his being in custody. This argument is without merit. In the prison setting, the facts and circumstances must demonstrate a restriction of Petitioner's freedom over and above that of his normal confinement in order to establish that he is in custody. See Cervantes, 589 F.2d at 428. The law of this circuit is clear that the mere fact of confinement is not dispositive of the custody issue. Id.; see also Turner, 28 F.3d at 983.

The Court finds and concludes that Petitioner was not in custody at the time he made his confession to Dr. O'Connor. Applying an independent review to the relevant facts, see Thompson, 516 U.S. at 115, all of the Cervantes factors militate against a determination that Petitioner was in custody. First, no prison official summoned Petitioner; Petitioner, himself, decided to wait and talk with Dr. O'Connor. Next, the physical surroundings did not present an atmosphere consistent with the view that further limitations had been placed upon Petitioner; rather, the verbal exchange with Dr. O'Connor took place in a large multi-purpose room. Furthermore, a law enforcement official did not confront Petitioner with any evidence of his guilt; although the group therapy participants did refer to Petitioner as cold-blooded, these participants were not law enforcement officials but prisoners, acting in a private capacity. Finally, there was no additional pressure to detain Petitioner; Petitioner's confession occurred at a time and place where he chose to be. A state actor did not detain Petitioner in an environment such as a jail cell and subject him to questioning. Consequently, Petitioner was not "in custody" and entitled to Miranda warnings prior to his confession to Dr. O'Connor. See Cervantes, 589 F.2d at 428; cf. United States v. Cheely, 36 F.3d 1439,

1447 (9th Cir. 1994) (holding that custodial interrogation is found where the circumstances involve a prisoner who is taken from his cell to a locked room, strip searched, and questioned for two hours by a non-staff government agent about a matter not under investigation within the prison itself).

Although the Court's ruling on custody disposes of the issue of Petitioner's entitlement to Miranda warnings, see Oregon v. Elstad, 470 U.S. at 309 (holding that Miranda warnings are applicable only to facts and circumstances supporting both custody and interrogation), the Court also concludes, as a matter of law,[5] that D. O'Connor did not interrogate Petitioner prior to his confession. Rather, Petitioner made a voluntary and spontaneous confession to Dr. O'Connor.

Petitioner does not contend that Dr. O'Connor expressly interrogated him; rather, Petitioner asserts that Dr. O'Connor's actions toward him were the functional equivalent of interrogation.. Petitioner bases this claim upon the following actions. First, Petitioner states that Dr. O'Connor selected him to participate in a group therapy session whose main purpose was to try and deal with the problem of male prisoners treating female prisoners and staff as sex objects rather than as persons with dignity, all the while knowing that Petitioner faced a pending trial on charges of sexual assault. Next, Petitioner points out that jail officials required him to sign a contract related to the group therapy sessions. Beaty, 158 Ariz. at 238, 762 P.2d at 5 25; (See R.O.A. 338v(2).) As part of this contract, Petitioner promised to hold group communications confidential. Additionally, jail officials required Petitioner to promise his own good faith participation in the group sessions. Petitioner also points out that Dr. O'Connor chaired the group therapy sessions and, specifically, that Dr. O'Connor chaired the session in which the group participants referred to petitioner as cold-blooded. Next, on the basis of the above, Petitioner contends that Dr.

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5. Whether a person has been subjected to the functional equivalent of interrogation is an issue that merits independent consideration in a federal habeas corpus proceeding. Endress v. Dugger, 880 F.2d 1244, 1249 (11th Cir. 1989), cert. denied, 495 U.S. 904 (1990).

O'Connor led him to believe that any communication he had with Dr. O'Connor was confidential, regardless of whether the communication occurred during a group session or otherwise. In summary, Petitioner contends that these actions are the functional equivalent of interrogation and provoked his confession to Dr. O'Connor.

Initially, the Court determines that the actions of the prisoners may not be vicariously shifted to Dr. O'Connor. It was the prisoners participating in the group sessions who accused Petitioner of being "cold-blooded," not Dr. O'Connor. Miranda does not govern alleged interrogation by private persons acting on their own. See United States v. Eide, 875 F.2d 1429, 1433-34 (9th Cir. 1989). The Court rejects the proposition that Dr. O'Connor interrogated Petitioner during the group therapy session; Dr. O'Connor merely was present when the prisoners directed their insults at Petitioner during the group therapy session.

The Court's review of pertinent legal precedent establishes that Dr. O'Connor's actions did not meet the functional equivalent standard of interrogation. In Rhode Island v. Innis, the Supreme Court held that two police officers discussing the missing murder weapon in front of the suspect while they transported him to the police station did not rise to the level of the functional equivalent of interrogation. Innis, 446 U.S. at 302-03. The Court held that the words and actions of the police officers did not lead to the conclusion that they should have known what they said and did would elicit an incriminating response from the suspect. Id. at 302.

Similarly in Moreno-Flores, 33 F.3d at 1169, the Ninth Circuit held that a law enforcement officer's statement to an accused drug smuggler that they had seized about 600 pounds of cocaine and that the suspect was in serious trouble was not the functional equivalent of interrogation. Further, in Shedelbower v. Estelle, 885 F.2d 570, 572-73 (9th Cir. 1989), cert. denied, 498 U.S. 1092 (1991), the Ninth Circuit held that a police officer's statements to a suspect that his accomplice had been arrested and that the victim had identified the suspect, even though that latter statement was untrue, did not constitute the functional equivalent of interrogation.

In comparison with the above, Dr. O'Connor neither engaged Petitioner in express questioning nor the functional equivalent thereof. Dr. O'Connor testified that Petitioner's statement "more or less came out of the blue and seemed inappropriate at the time," and that he was "somewhat shock[ed]" that Petitioner had provided such a statement to him. (R.T. 5/31/85 at 22-23.) The Arizona Supreme Court held that Petitioner's confession was spontaneous, and was not the result of interrogation. Beaty, 158 Ariz. at 240-41, 762 P.2d at 527-28. The Court agrees. The facts and circumstances of this case demonstrate that Petitioner made his confession to Dr. O'Connor without any inducement, provocation, encouragement or acquiescence by Dr. O'Connor. Although Petitioner may have felt prompted by the group members' comments to wait and talk with Dr. O'Connor, what is determinative here is that Dr. O'Connor did nothing which he reasonably should have known would produce an incriminating response from Petitioner.

It is true that, under certain facts and circumstances, psychological ploys may be the functional equivalent of interrogation. See Arizona v. Mauro, 481 U.S. 520 (1987). In Mauro, at the wife's request, she was allowed to visit her husband, a murder suspect, in an interrogation room with law enforcement officers present and tape recording the conversation. Previously, the suspect had invoked his Fifth Amendment right to counsel concerning further police questioning. During the visit with his wife, the suspect incriminated himself. The Supreme Court held that there was no evidence that the officers sent the wife to the suspect with the purpose of eliciting incriminating statements. The Court concluded that "the actions in this case were far less questionable than the subtle compulsion that we held not to be interrogation in Innis." Id. at 528-29.

Similar to Mauro, there is no evidence here of a psychological ploy designed to obtain a confession from Petitioner. Petitioner was enlisted into the group therapy session because his own behavior at the jail was causing problems. Jail officials had a genuine correctional purpose in the establishment of the group therapy sessions. Further, the record is clear that Petitioner's confession to Dr. O'Connor was after the group

session had ended and was without any coercion or subtle compulsion from Dr. O'Connor.

United States v. Webb, 755 F.2d 382 (5th Cir. 1985), also supports the Court's conclusion that the state did not use a psychological ploy to obtain a confession from Petitioner. In Webb, a murder suspect climbed a communications tower in his flight from police and was threatening to commit suicide. The police called in a psychiatrist. The psychiatrist engaged the suspect in conversation trying to talk him into coming down from the tower. The suspect repeatedly confessed to murder in these conversations with the psychiatrist. Subsequently, defendant sought to have his confession suppressed on the ground of custodial interrogation and the lack of a Miranda warning. The court found no interrogation. The court found that the psychiatrist was trying to prevent the suspect from attempting suicide. The court held that the psychiatrist was not trying to elicit an incriminating response from the suspect nor should he have known that his questioning would elicit an incriminating response. Webb, 755 F.2d at 391.

Next, Petitioner asserts that Estelle v. Smith, 451 U.S. 454 (1981), supports his contention that he was entitled to Miranda warnings from Dr. O'Connor since Dr. O'Connor later testified against Petitioner at his criminal trial. In Estelle v. Smith, the Supreme Court considered whether the sentence of a capital defendant should be vacated when facts and circumstances involved incriminating statements made by the defendant to a psychiatrist. The trial court, sua sponte, had appointed the psychiatrist to personally interview the defendant to determine his competency to stand trial. Armed with the authority of the court appointment, the psychiatrist questioned the defendant and found him competent. The jury found the defendant guilty. At sentencing, the government introduced statements the defendant made to the psychiatrist for the purpose of demonstrating future dangerousness. The psychiatrist had not provided defendant any Miranda warnings prior to express questioning. The Supreme Court held:

> Volunteered statements . . . are not barred by the Fifth Amendment, but under Miranda v. Arizona, . . . we must

> conclude that, when faced while in custody with a court-ordered psychiatric inquiry, respondent's statements to [the psychiatrist] were not given freely and voluntarily without any compelling influences and as such could be used as the State did at the penalty phase only if respondent had been apprised of his rights and had knowingly decided to waive them.

Id. at 469 (further quotation and citation omitted).

Estelle v. Smith is not controlling in the present case. It is clearly distinguishable because the court-ordered psychiatric examination in Smith amounted to both custody and interrogation.[6] Absent custodial interrogation, Miranda warnings are not required. Oregon v. Elstad, 470 U.S. at 309. Under the facts and circumstances of this case, Petitioner has established neither custody nor interrogation.

Based on the foregoing, this Court rejects Petitioner's claim that Dr. O'Connor was under an obligation to provide him with Miranda warnings prior to the point at which Petitioner blurted out his confession.

B. Whether Petitioner's Confession Was Involuntary and Introduced In Violation of His Due process Rights Under the Fifth Amendment.

Petitioner alleges that his confession was involuntary because: 1) a Fifth Amendment Miranda violation makes a confession presumptively involuntary; 2) it was induced by a promise of confidentiality; 3) it was

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6. To the same effect, Petitioner argues that Pens v. Bail, 902 F.2d 1464 (9th Cir. 1990), supports his Miranda claim. Pens does not provide support for Petitioner's Miranda claim because the relief granted in Pens was based upon an involuntary confession, not Miranda. Pens relied upon Jones v. Cardwell, 686 F.2d 754 (9th Cir. 1982), cert. denied, 440 U.S. 965 (1979). In Jones, the Ninth Circuit held that the petitioner was entitled to resentencing because the trial court used an involuntary confession to enhance his sentence. The Jones panel expressly refused to decide whether the petitioner was entitled to Miranda warnings. Id. at 757 n.2. Pens is further discussed infra at 30.

induced by Petitioner's forced participation in the group therapy discussions; and 4) it was coerced by fellow inmates during the group therapy discussion. Respondents argue that Petitioner only raised the inducement-by-promise claim in state court and that the other subparts (1, 3, & 4) are procedurally barred here. Respondents also argue that Petitioner did not show legitimate cause and actual prejudice, or a fundamental miscarriage of justice, so as to avoid the procedural bar. The Court finds that Petitioner fairly presented in state court subparts 1, 2 and 4. Therefore, these issues are reached on the merits. However, subpart number 3 was not fairly presented, and thus, not actually exhausted in state court. The question of exhaustion, preclusion, and procedural bar on subpart (3) is discussed infra at page 62 to 64.

(1) Involuntariness Due to Miranda Violation.

Petitioner extensively argued in state court that Respondents' failure to provide him with Miranda warnings prior to his confession violated his rights under the Fifth Amendment. Although Petitioner, in state court, did not principally characterize this claim as an involuntariness claim under the Due Process Clause of the Fifth Amendment, on federal habeas, Petitioner is allowed to recharacterize his claim, somewhat, so long as the substance of the claim is fairly presented. See Picard v. Connor, 404 U.S. 270, 278 (1971). The substance of this claim was fairly presented; therefore, the Court will reach its merits.

As the Court has previously ruled, Petitioner may not invoke the procedural mandates of Miranda absent custodial interrogation. The Court finds, under the facts of this case, both that Petitioner was not in custody and that petitioner was not interrogated. Consequently, since there is no Miranda violation, Petitioner's confession may not be rendered presumptively involuntary in violation of the Fifth Amendment.

(2) Involuntariness Due to Inducement by Promise of Confidentiality

Next, Petitioner alleges that his confession was involuntary because it was induced by a promise of confidentiality. Petitioner argues here, as he did in state court, that the group counseling contract he signed contains a promise that renders his confession to Dr. O'Connor involuntary. Respondents acknowledge that Petitioner fairly presented this issue to the state courts. (File doc. 37 at 15.) The Arizona Supreme Court held that the promises made to Petitioner did not render his confession involuntary.

(a) Factual Background and Factual Findings Entered by the State Supreme Court.

The relevant factual background has already been set forth by the Court and will not be repeated here, except to highlight additional facts relevant to this voluntariness inquiry. See supra page 5 to page 7. In August 1984, after petitioner's transfer to the Durango facility, he became a difficult prisoner, in that he made inappropriate sexual gestures and comments to female staff and female prisoners. (R.T. 5/31/85 at 16-17, 20.) Petitioner was not the only problem prisoner in this regard. (Id.; see also R.T. 6/10/85 at 28.) As a result of Petitioner's conduct, he was asked to volunteer in an experimental group, consisting of five male prisoners and five female prisoners. (R.T. 6/10/85 at 35.) One of the purposes of the experimental group was a type of jail management, to keep peace among the prisoners. (R.T. 5/31/85 at 16.) Another purpose of the group was to help the prisoners treat women with dignity. (Id. at 16-17; R.T. 6/10/85 at 28.) The record indicates that the jail psychiatrists did not ask Petitioner to volunteer with the intent to obtain an inculpatory confession from him. (Id.) The record shows that Petitioner was asked to volunteer based upon his own difficult conduct. (Id.) As part of Petitioner's entry and participation in the group, Petitioner signed an agreement, as follows:

"Interpersonal Relationships Group Contract"

Please read the following guidelines and sign below.

1. I will attend each group meeting unless I have other "official" committments e.g. court because I am an important part of this group; I AM this group.

2. I have the ability to observe my own behavior; I can distinguish my actions as appropriate or inappropriate. Should I choose to behave inappropriately, I will be asked to leave the group.

3. I understand that all group communication is confidential and therefore group business cannot be discussed outside of group. Only in this way can I feel free to express my feelings.

4. I am committed to myself, and therefore to this group to learning about myself, my feelings and my behavior about relationships. I understand that growth will come from examining my thoughts, feelings and behavior in my relationships. Finally I accept the responsibility of being good to myself.

I, Donald E. Beaty have read the guidelines listed above and I agree to follow them as a group member. . . .

I, Lilly Epler understand that my job as therapist is to assist Don with his/her growth in relationships, I am personally committed to this goal with Donald Beaty. . .

Date: Nov. 15, 1984

(R.O.A. 338v(2).)

Because the group consisted of ten people, Dr. O'Connor testified that he was not treating Petitioner in particular, in that the focus was on all ten participants. (R.T. 5/31/85 at 18-19.) Likewise, the state supreme court found that Dr. O'Connor was not treating Petitioner individually, in that Petitioner was only one member of the prisoner

group session that he was conducting. Beaty, 158 Ariz. at 238, 762 P.2d at 525. During one of the sessions, the group members accused Petitioner of being cold-blooded, which he denied. (R.T. 6/10/85 at 39.) After the session had ended, Petitioner waited to talk to Dr. O'Connor. Id. at 29. Petitioner waited for a period of between a few to 15 minutes, before he spoke with Dr. O'Connor. Beaty, 158 Ariz. at 239, 762 P.2d at 525-26; R.T. 5/31/85 at 21. It was at this time that Petitioner confessed to Dr. O'Connor. (R.T. 6/10/85 at 30-31.)

As previously indicated, the factual findings entered by the Arizona Supreme Court are entitled to a presumption of correctness so long as they are fairly supported in the record. Summner v. Mata, 449 U.S. at 546-47. The Arizona Supreme Court found that the statements made by Petitioner to Dr. O'Connor did not relate to group business. Further, the Arizona Supreme Court found that the statements made by Petitioner to Dr. O'Connor were not given during the group session. Beaty, 158 Ariz. at 240, 762 P.2d at 527. The court indicated that the confession took place "after one of the sessions had ended." Id. at 238, 762 P.2d at 525.

Although the ultimate question of whether, under the totality of circumstances, the challenged confession was voluntary is a matter of independent federal review, subsidiary and historical factual findings are entitled to a presumption of correctness. Miller v. Fenton, 474 U.S. 104, 112, 117 (1985). For example, factual findings concerning a petitioner's state of mind are entitled to a presumption of correctness. See United States v. Miller, 984 F.2d 1028, 1030 (9th Cir.), cert. denied, 510 U.S. 894 (1993). Subsidiary questions such as the length and circumstances of an interrogation, a petitioner's prior experience with the legal process, familiarity with Miranda warnings, often require the resolution of conflicting testimony. Therefore, state court findings on such matters are conclusive on the federal habeas court, if fairly supported in the record. Miller, 474 U.S. at 117; see also Pemberton v. Collins, 991 F.2d 1218, 1225 (5th Cir.) (stating that whether the police engaged in the coercive tactics alleged by the defendant is a subsidiary fact entitled to deference on habeas review), cert. denied, 510 U.S. 1025 (1993). Moreover, when a state court makes reasonable inferences

drawn from the evidence, such inferences are presumed correct under 28 U.S.C. § 2254. Oxborrow v. Eikenberry, 877 F.2d 1395, 1401 (9th Cir. 1989).[7] Even if a fact as found disposes of the constitutional question, it is still entitled to a presumption of correctness. Miller, 474 U.S. at 113 (stating that an example of a dispositive constitutional fact is whether a defendant intended to discriminate against the plaintiff).

Here, the Court agrees with the Respondents that the above referenced factual findings entered by the state supreme court are subsidiary historical facts entitled to a presumption of correctness. The record indicates that petitioner's confession did take place ***after*** the group session had ended. (See R.T. 5/31/85 at 21, 44; R.T. 6/10/85 at 29.) The Arizona Supreme Court found that the confession did not relate to group business, since the communication occurred after the group session had ended. This finding is entitled to a presumption of correctness. Dr. O'Connor testified that he was shocked that petitioner made the confession, that it came out of the blue, and that it was inappropriate at that time. (R.T. 5/31/85 at 22-23.) Dr. O'Connor further testified that Petitioner volunteered the statement and that it was unsolicited. (R.T. 5/31/85 at 23.)

Because there is fair support in the record for the findings of the state supreme court, to overcome the presumption of correctness, Petitioner must provide convincing evidence that the state court findings are in error. See 28 U.S.C. § 2254(d)(8). Absent convincing evidence to the contrary, this Court must defer to state court factual findings and it may set them aside only if they lack fair support in the record. Marshall v. Lonberger, 459 U.S. 422, 432 (1983).

Petitioner has not shown convincing evidence to the contrary in the record. Therefore, his effort to overcome the presumption must fail. Petitioner merely encourages the Court to reinterpret the evidence and

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7. In Palmer v. Estelle, 985 F.2d 456, 459 (9th Cir. 1993), the Ninth Circuit determined that where the record is ambiguous and can be read to support or refute petitioner's position, it is error to substitute a federal view of the facts for that of the state court findings.

disagree with the factual findings made by the Arizona Supreme Court. Although Petitioner points to additional testimony from Dr. O'Connor to the effect that Petitioner's confession responded to statements made during a group session, Petitioner does not disagree that the confession took place after the group session had ended. (R.T. 6/10/85 at 29; File doc. 48 at 31-32.) Absent convincing evidence to the contrary, the subsidiary state court factual findings concerning the voluntariness of Petitioner's confession are entitled to a presumption of correctness. See Marshall, 459 U.S. at 432.

(b) Involuntariness of Confession.

The use of a defendant's involuntary statement violates the Due Process Clause of the Fifth Amendment. United States v. Miller, 984 F.2d at 1030. However, due process does not bar the use of a confession unless government officials employed coercive interrogation tactics which rendered the defendant's confession involuntary as a matter of law. United States v. Wolf, 813 F.2d 970, 974 (9th Cir. 1987). An involuntary confession may result from psychological, as well as physical coercion. Blackburn v. Alabama, 361 U.S. 199, 206 (1960); United States v. Miller, 984 F.2d at 1030. In psychological coercion cases, the voluntariness of a confession is determined by considering the totality of the circumstances. United States v. Miller, 984 F.2d at 1031. The pivotal issue is whether the defendant's will was overborne when he confessed. See id.; see also Derrick v. Peterson, 924 F.2d 813, 817 (9th Cir. 1990), cert. denied, 502 U.S. 803 (1991). On collateral review, the habeas corpus petitioner must prove the involuntariness of a confession by a preponderance of the evidence. Miller v. Fenton, 796 F.2d 598, 604 (3rd Cir.), cert. denied, 479 U.S. 989 (1986).

Petitioner alleges that his confession was involuntary because it was induced by the state's promise of confidentiality, citing Bram v. United States, 168 U.S. 532 (1897). Although Bram does state a broad rule against the extraction of confessions by means of threats, violence and direct or implied promises, however slight, the United States Supreme Court announced in Arizona v. Fulminante, 499 U.S. 279, 285 (1991),

that Bram does not state the standard for determining the voluntariness of a confession. Id. The test is whether, considering the totality of the circumstances, the government obtained the confession by psychological coercion or improper inducement so that the suspect's will was overborne. United States v. Leon Guerrero, 847 F.2d 1363, 1366 (9th Cir. 1988). The Ninth Circuit, as well as other circuits, have not applied a per se rule invalidating statements made by a suspect in response to a government official's promise. Id.; Miller v. Fenton, 796 F.2d at 608-09 (discussing how other circuits have construed and limited the Bram holding). It does not matter that the accused confessed because of the promise, so long as the promise did not overbear his will. Leon Guerrero, 847 F.2d at 1366.

Examining the totality of the circumstances in this case requires the Court to determine not just whether there was a promise made to Petitioner, but the scope of that promise. See United States v. Rambo, 74 F.3d 948, 953-54 (9th Cir.), cert. denied, 519 U.S. 819 (1996); see also United States v. Walton, 10 F.3d 1024, 1028-29 (3rd Cir. 1993) (stating that the appropriate inquiry is whether a defendant actually believed the government's promise and the scope of such promise). As to the scope of the promise, the promise of confidentiality extended to Petitioner is examined from Petitioner's viewpoint, determining whether he reasonably perceived the promise as he asserts. See Miller v. Fenton, 796 F.2d at 608. Additionally, this Court must determine whether there is a causal connection between the scope of the promise made and the confession. See Colorado v. Connelly, 479 U.S. 157, 165 (1986). On independent review, the Court, ultimately, must determine whether the promise was so manipulative or coercive that it deprived Petitioner of his ability to make an unconstrained, autonomous decision to confess. See Walton, 10 F.3d at 1029-30.

Petitioner, in an affidavit submitted to the state supreme court, recited that prior to entry into the group therapy sessions at Durango, he signed the contract, agreeing "to participate regularly in group discussions in exchange for a written assurance that all communication made by him within the group would be confidential." (R.O.A.

338w(2), 338x(2) & 338y(2).)[8] Petitioner additionally averred that he had been given to understand that all statements which he made to Dr. O'Connor would be held in confidence. Id. Other than this self-serving averment, Petitioner does not further evidence the basis for his understanding that all statements he made to Dr. O'Connor were made under a promise of confidentiality.

Petitioner's affidavit arose in the context of his argument on direct appeal that his statements to Dr. O'Connor were privileged and therefore confidential as arising within the physician-patient privilege. This state-law issue is not before the Court on federal habeas review. The contract extended confidentiality to communications within the group. This is a limited promise of confidentiality. Petitioner's understanding of a broader promise of confidentiality is unreasonable and could not form the basis for reasonable reliance. Petitioner's understanding that all statements made to Dr. O'Connor were confidential also conflicts with the factual findings made by the state supreme court. The state supreme court found that Dr. O'Connor was not treating Petitioner individually, in that Petitioner was only one member of ten of the prisoner group session that he was conducting. Beaty, 158 Ariz. at 238, 762 P.2d at 525. Under these facts and circumstances, the scope of the promise of confidentiality is confined to the terms and provisions of the contract signed by Petitioner.

Next, the Court must determine any causal connection between the scope of the promise as found, and the confession. See Connelly, 479 U.S. at 165. As part of this inquiry, the Court must determine whether the State breached its promise of confidentiality to Petitioner. See Walton, 10 F.3d at 1030 ("[T]here are certain promises whose attraction renders a resulting confession involuntary ***if the promises are not kept***, and the defendant's perception of what the government agents have promised is an important factor in determining voluntariness.") (emphasis added). Petitioner admitted in his affidavit that he agreed to

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8. The contract provided: "I understand that all group communication is confidential and therefore group business cannot be discussed outside of group. Only in this way can I feel free to express my feelings." (R.O.A. 338v(2).)

participate regularly in the group discussions in exchange for a written assurance that all communication made by him ***within the group*** would be confidential. (R.O.A. 338w(2), 338x(2) & 338y(2) (emphasis added.) The Court has found that Petitioner's confession took place after the group session had ended. Under these facts, the State did not breach its promise of confidentiality to Petitioner. Thus, there is no causal connection between the promise–as limited to the scope set forth above–and his confession.

Ultimately, the Court must determine whether the promise extended to Petitioner overbore his will. To make such a showing, Petitioner has to demonstrate a coercive promise which deprived him of his ability to make an unconstrained autonomous decision to confess. See Rambo, 74 F.3d at 954; Walton, 10 F.3d at 1030; United States v. Miller, 984 F.2d at 1030. The facts show that the promised confidentiality did not extend to Petitioner's meeting with Dr. O'Connor after the group therapy session had ended. Therefore, a coercive promise is lacking. Petitioner's personal characteristics and background are also relevant in considering the effect that the totality of circumstances had upon the will of the Petitioner. See Schneckloth v. Bustamonte, 412 U.S. 218, 226-27 (1973). In this case, the facts concerning Petitioner's age, previous criminal record, education or lack thereof, and intelligence do not suggest that Petitioner's will was overborne. (See Presentence Report, R.O.A. 334.) Based on the foregoing, the Court concludes that Petitioner's confession to Dr. O'Connor was voluntary in the context of the Fifth Amendment.

United States v. Robinson, 439 F.2d 553 (D.C. Cir. 1970), which is relied upon by Petitioner, is out-of-circuit authority and not generally persuasive. Moreover, it is factually distinguishable and therefore, not dispositive of the issue under the Court's consideration. In Robinson, the circuit court on direct appeal overturned a murder conviction finding that defendant's confession to his psychologist was inadmissible at trial because it violated Miranda and/or was involuntary.

As a result of a previous conviction, Robinson had been committed to a high security mental hospital. 439 F.2d at 555-58. As a mental patient at the hospital, Robinson was assigned to a psychologist, Dr. Elliot Blum. Id. During his treatment, which included both personal interviews and group therapy sessions, Robinson made progress and was given more freedom of movement at the hospital. Id. Robinson used this enhanced freedom to murder a nurse at the hospital. Id. When Robinson became a suspect in the murder, he was moved back to maximum security. Id. Thereafter, he called Dr. Blum and told him that he needed to speak with him. Id. At their meeting, Robinson confessed to the murder and asked Dr. Blum what he should do. Id. Dr. Blum advised Robinson to also confess to the Clinical Director and the Ward Administrator, which advice Robinson followed. Id.

The Robinson court held that his confession was inadmissible. The rationale for the court's holding is imprecise. However, as it pertains to voluntariness, the court held that because Robinson was a mental patient, he was strongly under this psychologist's influence and there was a compulsion to confess to him which caused Robinson's confession to become involuntary.

The facts here are clearly distinguishable from Robinson. Petitioner was not a mental patient; Robinson was. Next, Petitioner, unlike Robinson, did not have a long-term relationship with an assigned psychologist. Dr. Blum was Robinson's psychologist. The relationship of more than a years duration began in May 1965 and included psychotherapy sessions twice a week. Dr. Blum, in these frequent contacts with Robinson, "had developed with him a relationship of confidence with respect to his personal problems." 439 F.2d at 560. In his characterization of the confession that Robinson gave to him, Dr. Blum stated that "it was more of a compelling kind of thin * * * that he had to tell me." Id. Thus, Robinson, as a mental patient, was deeply under the influence of his psychologist. Furthermore, Dr. Blum testified that he told Robinson to confess to other hospital administrators; he did. Id. at 557. Blum also testified that had he told Robinson to get an attorney, Robinson would have. Id. Consequently, under this type of influence, there was not only a compulsion for

Robinson to confess to his psychologist, there was an inherent promise of confidentiality in their discussions. In contrast, Petitioner was not a mental patient and did not have the same or similar relationship with Dr. O'Connor that Robinson had with Dr. Blum. Under these facts and circumstances, Petitioner was not under a similar compulsion to confess to Dr. O'Connor. More importantly, the promise of confidentiality in this case was limited, it did not extend to all conversations that Petitioner had with Dr. O'Connor.

A brief review of other case authority on this issue supports the Court's conclusion that petitioner's confession was voluntary. In Rambo, the defendant initiated a conversation with a law enforcement official and asked if the two could talk in confidence. 74 F.3d at 954. The officer responded that it depended on what the conversation was about. Id. The defendant then proceeded to make several incriminating statements. The Ninth Circuit held that the defendant proceeded at his own risk when he made the statements, as there was no confirmed promised of confidentiality. Id.; see also State v. Miller, 709 P.2d 225, 238 n.10 (Ore. 1985), cert. denied, 475 U.S. 1141 (1986) (holding confession voluntary under the Fifth Amendment where defendant confessed to psychiatrist before ensuring that the conversation was confidential).

In contrast, in Walton, 10 F.3d at 1028-32, a law enforcement officer promised the defendant that he could speak to the officers "off the cuff." There was no qualification or contingency as to the assurance of confidentiality. The court characterized this as a direct promise and held that the promised confidentiality overbore the defendant's will rendering the confession involuntary. Id.; see also United States v. Conley, 859 F. Supp. 830 (W.D. Penn. 1994) (unqualified promise that anything said would not be used against defendant held coercive).

In Pens v. Bail, 902 F.2d 1464 (9th Cir. 1990), the Ninth Circuit granted habeas relief for an improper sentence enhancement which was violative of the Fifth Amendment. The facts in Pens concerned a convicted state defendant who had been committed to a psychiatric facility for treatment prior to sentencing. During psychiatric treatment,

"[f]ull confession and cooperation were represented as necessary for successful treatment and eventual release. Assured of confidentiality, Pens divulged a range of incriminating information." Pens, 902 F.2d at 1465. Pens' statements were utilized by the state court for sentence enhancement. As in Walton and Conley, the promise to the defendant contained no qualification or contingency as to the assurance of confidentiality. The Ninth Circuit held that use of the incriminating statements was a violation of the defendant's Fifth Amendment rights.

In Walton, Conley and Pens, the defendants were given an unqualified promise of confidentiality; in each case the resulting confession was declared involuntary. In Rambo and Miller, the defendants hoped that their conversations were confidential and confessed. They did not obtain prior assurance that such confessions were covered under a promise of confidentiality. Absent a promise of confidentiality, the courts held their confessions voluntary.

In this case, the promise of confidentiality extended to Petitioner was qualified and contingent. As the promise was reduced to writing, Petitioner knew that the confidentiality promised was limited. Prior to confessing, he did not receive assurance that such a confession (made outside the group session) would be covered under the promise of confidentiality. He merely hoped or believed it would and confessed. Based on the totality of circumstances, the Court concludes that the limited promise of confidentiality did not induce Petitioner's confession.

(3) Forced Participation in Group Therapy Sessions.

At infra page 62 to 64, the Court concludes that this subpart is procedurally barred. Alternatively, if this claim were not procedurally barred, it also fails on the merits. Petitioner argues that his confession was involuntary because he was forced to participate in the group sessions under threat of being returned to the main jail. (File doc. 27 at 42.) Petitioner does not support the claim that he was expressly threatened with return to the main jail if he refused to participate in group therapy. Moreover, the Court concludes that even if such threat

had been made, it would not have overpowered Petitioner's will, and resulted in Petitioner's confession to Dr. O'Connor.

(4) Inmate Coercion.

Respondents argue that Petitioner's inmate coercion claim was not fairly presented to the state court. The substance of this claim was submitted by the State in its Answering Brief to the state supreme court, where it argued that Petitioner is apparently trying to excuse his conduct, all in response to the taunts directed at him by other members of the discussion group during the session. (See Appellee Answering Brief at 11.) The state supreme court considered the substance of this claim in its disposition, when it recognized, in the context of Petitioner's confession, that inmate participants had accused Petitioner of being a terrible person. Beaty, 158 Ariz. at 239, 762 P.2d at 526. The state supreme court also addressed these facts in Petitioner's involuntariness claim. Id. at 240, 762 P.2d at 527. Furthermore, Petitioner demonstrates that the factual predicate and legal theory were argued in his Motion for Reconsideration of the state supreme court opinion. (File doc. 48 at 38 citing Petitioner's Motion for Reconsideration, 10/6/88, at 5.)

Based upon all of these references, the Court holds that the factual predicate and legal theory were fairly presented to the state. Although Petitioner did not present the label inmate coercion, that point was referenced and Petitioner, on federal habeas, is allowed to recharacterize his claim, somewhat, so long as he does not fundamentally alter it. Vasquez v. Hillery, 474 U.S 254, 260 (1986). Accordingly, this claim will be addressed on the merits.

As previously noted, during one of the group therapy sessions, the inmate group members accused Petitioner of being cold-blooded. (R.T. 6/10/85 at 39.) After the session ended, Petitioner waited to talk with Dr. O'Connor. (R.T. 5/31/85 at 22.) After a waiting period of between a few to 15 minutes, Petitioner spoke with Dr. O'Connor. Beaty, 158 Ariz. at 239, 762 P.2d at 526; R.T. 5/31/85 at 21. It was at this time that Petitioner blurted out his confession to Dr. O'Connor.

Coercive conduct by a state actor is a necessary prerequisite to the conclusion that a confession was involuntary. Connelly, 479 U.S. at 165; Derrick v. Peterson, 924 F.2d at 818 (holding that coercive police activity is necessary to support finding of involuntary confession); see also United States v. D.F., 115 F.3d 413, 419 (7th Cir. 1997). The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause. Connelly, 479 U.S. at 166.

Absent state action, Petitioner has no claim of an involuntary confession. Under the facts of this case, this Court concludes that the jail prisoners in the group therapy session were not state actors. Further, there is no evidence that any state official asked the prisoners to confront Petitioner or elicit incriminating information. See Connelly, 479 U.S. at 166. Consequently, Petitioner's claim that his Fifth Amendment right was violated by inmate coercion must fail.[9]

Claim 2: The Admission of Petitioner's Remark Violated His Sixth Amendment Right to Counsel.

Petitioner claims that his Sixth Amendment Right to Counsel requires that his counsel be present at a confrontation between he and a state psychiatrist. Respondents contend that this claim is procedurally barred because it was never presented in state court.[10] Petitioner argues that he did fairly present this claim because he "extensively briefed the case Estelle v. Smith which relied on both the Self-Incrimination and the Right to Counsel clauses of the Constitution." (File doc. 48 at 43.)

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9. Even if the Court did conclude, which it does not, that sufficient state action existed because of Dr. O'Connor's presence in the group, Petitioner's claim would still fail. Dr. O'Connor was present when the inmates taunted Petitioner. However, Dr. O'Connor's mere presence in the group did not overbear Petitioner's will and cause him to confess. Cf. United States v. D.F., 115 F.3d at 420-21 (holding that coercion is present rendering a confession involuntary when the state actor acts as a law enforcement surrogate, gaining the trust of the patient, questioning them about crimes committed, all with an eye toward the criminal prosecution of the patient).

10. The principles of exhaustion and procedural bar are discussed infra at page 55 to page 58.

In his Amended Opening Brief for the direct appeal, Petitioner cited Estelle in support of his claim that his statement to Dr. O'Connor "was obtained in violation of the requirements of Miranda v. Arizona." In a footnote, Petitioner argued: "[T]he controlling factor is . . . the violation of Beaty's Fifth and Sixth Amendment rights caused by the introduction of his psychiatric confession at trial." (Amended Opening Brief at 18.) In another footnote, Petitioner again mentioned the "Sixth Amendment right to the assistance of counsel." (Amended Opening Brief at 20.) Therefore, this Court finds that this claim was fairly presented to the Arizona Supreme Court.

A. Critical Stage Inquiry.

The Supreme Court has ruled that an accused has a federal constitutional right to effective assistance of counsel at all "critical stages" of the criminal proceedings against him. Coleman v. Alabama, 399 U.S. 1, 7 (1970). In Powell v. Alabama, 287 U.S. 45 (1932), the Court recognized that an accused's constitutional right to a fair trial necessarily included the right to assistance of counsel at that trial. Id. at 69; see also Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (Sixth Amendment right to counsel binding on states via Fourteenth Amendment). The Court has since extended the constitutional right to counsel to other "critical stages" of the criminal proceedings, that include a preliminary hearing, Coleman, 399 U.S. at 7, a pretrial lineup, United States v. Wade, 388 U.S. 218, 236-37 (1967), a court-ordered psychiatric examination, Estelle v. Smith, 451 U.S. 454, 471 (1981), sentencing, Mempa v. Rhay, 389 U.S. 128, 134-35 (1967), and the first direct appeal, Douglas v. California, 372 U.S. 353, 356 (1963). The Ninth Circuit has extended the principles of Powell and its progeny to also include motions for a new trial made before the entry of the judgment of conviction, Menefield v. Borg, 881 F.2d 696, 699 (9th Cir. 1989), and competency hearings, Sturgis v. Goldsmith, 796 F.2d 1103, 1108 (9th Cir. 1986).

However, in United States v. Ash, 413 U.S. 300, 310 (1973), the Supreme Court explained the limitation of the right to counsel for pretrial events:

> This extension of the right to counsel to events before trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate pretrial events that might **appropriately be considered to be parts of the trial itself.**

Id. (emphasis added). The Ash Court then went on to hold that a pre-trial photographic identification procedure was not sufficiently trial-like to require Sixth Amendment counsel. Id. at 317-18. The Court was unwilling to extend the right to counsel to the prosecutor's trial-preparation interviews, even though they included pre-trial identification.

Following Ash, the Ninth Circuit has stated that "[a]ny pretrial event requiring the presence of counsel should be a critical stage, analogous to a trial, where the accused may be overpowered by his professional adversary. The threshold analysis is whether "the trial itself can provide no substitute for counsel if a pretrial confrontation is conducted in the absence of counsel." Jordan v. Ducharme, 983 F.2d 933, 936 (9th Cir. 1993).

Here, Petitioner claims that his Sixth Amendment Right to Counsel required that his counsel be present at the confrontation between he and Dr. O'Connor. The Court disagrees. Petitioner's confession to Dr. O'Connor was not a trial-like confrontation. Petitioner's spontaneous confession occurred without any interrogation or questioning from Dr. O'Connor.

Petitioner's interaction with Dr. O'Connor must be distinguished from the psychiatric examination which occurred in Estelle v. Smith. The psychiatric examination in Estelle v. Smith was court-ordered. Defendant was brought to the psychiatrist who extensively questioned him about his criminal activity and other details of the crime he was accused of. 451 U.S. at 457-59. In contrast, the confession at issue here did not occur as a result of a court-ordered psychiatric examination. Here, Petitioner sought out Dr. O'Connor, who did not question or interrogate Petitioner, but rather, Petitioner voluntarily

confessed to Dr. O'Connor. Under these facts and circumstances, Petitioner's interaction with Dr. O'Connor was not a "critical stage," subject to Sixth Amendment effective assistance of counsel. Absent a critical stage, there can be no Sixth Amendment violation. United States v. Benlian, 63 F.3d 824, 827 (9th Cir. 1995).

Claim 4: Dr. O'Connor's Testimony Was Prejudicial.

Petitioner assumes in this claim that the Court has found some error in the admission of Dr. O'Connor's testimony at trial. Petitioner then goes on to present his reasons why the erroneous admission of Dr. O'Connor's testimony was not harmless beyond a reasonable doubt. Respondents contend that there was no error in the admission of the confession. The Court agrees. Absent an error, the Court need not engage in determining the effect of that alleged error upon Petitioner's trial.

Claim 5: Petitioner's Right to Counsel in Pursuing His Appeal in the Arizona Courts Was Abridged by His Counsel's Conflict of Interest.

At Petitioner's arraignment the Public Defender's Office was appointed as his counsel. However, shortly thereafter the Public Defender moved to withdraw from the representation because it had a conflict of interest. (M.E. 8/6/84.) The court held an in-camera hearing and approved the Public Defender's withdrawal. Id. For Petitioner's appeal, the Public Defender again was appointed as counsel. (M.E. 7/22/85.) In habeas Claim 5, Petitioner alleges that his right to counsel was violated because the Public Defender's Office still had an actual conflict of interest at the time it represented him on appeal. (File doc. 27 at 66-68.)

Respondents assert that Petitioner's third petition for post-conviction relief, which raised a conflict of interest claim, is different from Claim 5 as it is presented in the habeas petition. (File doc. 37, at 27.) Therefore, Respondents contend that Claim 5 is procedurally defaulted. (Id.)

In Petitioner's third PCR, filed pro se, he presented the following conflict of interest claim to the state courts:

> Petitioner contends that a "Conflict of Interest" still existed at the time his appeal started and that the Maricopa County Public Defenders Office should not have represented Beaty on appeal . . . .
>
> During Beaty's fist trial a number of witnesses changed their testimony from what they had previously told Public Defender Mary Wisdom, Anita Rosenthal and investigator Norma Shaw. Due to the conflicting testimony, Michael A. Miller advised the Court that he would call as witnesses, Mary Wisdom, Anita Rosenthal and investigator Norma Shaw to testify at trial that the witnesses were testifying falsely, and their testimony was crucial in Beaty's defense . . . .
>
> Beaty contends that if he wins a new trial, Mary Wisdom, Anita Rosenthal and Norma Shaw will be called to testify at trial, therefore, a "Conflict of Interest" still exist (sic) and thereby other counsel should have been appointed to represent Beaty on appeal . . . .
>
> Petitioner, for the reasons set forth above, submits that, (1) Superior Court Judge Rufus C. Coulter violated Beaty's Constitutional Rights to have Counsel appointed who did not have a "conflict of interest" on appeal, and (2) that Beaty's attorney on appeal, Edward F. McGee should have withdraw (sic) from handling Beaty's criminal appeal (which under a death sentence is automatic and a part of the criminal process), due to the conflict which existed.

(R.O.A. 355.) Petitioner's third PCR specifies the factual basis for his contention that an actual conflict of interest prohibited the Public Defender's office from representing him on appeal. (Id.) The substance of this claim, as specified by Petitioner, was fairly presented

and exhausted in the state courts. Therefore, the claim as specified by Petitioner, will be addressed on the merits.[11]

The Sixth Amendment right to counsel includes the right to counsel free from divided loyalty. Bonin v. Calderon, 59 F.3d 815, 825 (9th Cir. 1995), cert. denied , 116 S. Ct. 718 (1996) (citing Wood v. Georgia, 450 U.S. 261, 272 (1981)). The test for determining whether an alleged conflict of interest has deprived a Petitioner of his right to counsel in violation of the Sixth Amendment was established in Cuyler v. Sullivan, 446 U.S. 335 (1980), where the Supreme Court explained that a defendant must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. Bonin, 59 F.3d at 825 (citing Cuyler).

An actual conflict of interest is difficult to prove where counsel represents conflicting interests in successive cases. Maiden v. Bunnell, 35 F.3d 477, 480 (9th Cir. 1994). In cases of successive representation,

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11. In the moving papers and the response, as an alternative to the Court not agreeing with the State that the claim is procedurally defaulted, the substance of an entirely different conflict of interest claim was litigated for the first time in this habeas petition. (See File doc. 37, at 28, with Attachment; File doc. 48, at 57, with Attachments.) "A claim may be considered unexhausted if it includes new factual allegations which were not presented to the state courts." Chacon v. Wood, 36 F.3d 1459, 1468 (9th Cir. 1994). To fairly present and exhaust a claim, the substance of the claim must be fairly presented to the state court. Id. Federal-state comity favors the principle that federal courts should not entertain new factual allegations that place a claim in a significantly different posture, when those factual allegations were never presented to the state courts. See Nevius v. Sumner, 852 F.2d at 470. The allegations as presented in the moving papers do place the claim in a significantly different posture; therefore, the substance of this claim was not fairly presented and exhausted in state court. Petitioner's failure to present this claim to the state court is a procedural default. See Coleman, 501 U.S. at 735 n.1; Coley v. Gonzalez, 55 F.3d 1385, 1387 (9th Cir. 1995). Claims not fairly presented in state court are technically exhausted if the Court determines that the Petitioner no longer has any state court remedies available to him. The Court finds that Petitioner has no state court remedies remaining for this claim and that the state court would find the claim procedurally defaulted pursuant to Rule 32.2(a)(3), Ariz.R.Crim.P. There being no cause or prejudice or fundamental miscarriage of justice to excuse the default, the claim as presented in the moving papers is procedurally barred from further habeas review.

actual conflicts of interest arise only if the cases are substantially related or if the attorney reveals the privileged communications of a former client. Id.; see also Trone v. Smith, 621 F.2d 994, 998 (9th Cir. 1980) (stating that in cases of successive conflicting representation, the court's concern is not only with information leaks, but also with less-than-zealous representation of the present client).

As stated, a petitioner must prove an actual conflict, not just a possible or hypothetical conflict, through a factual showing on the record. See Morris v. California, 966 F.2d 448, 455 (9th Cir. 1991), cert. denied, 113 S. Ct. 96 (1992). To satisfy the requirement of adverse effect, a petitioner must demonstrate that due to the conflict, some adverse effect on counsel's handling of particular aspects of the trial or appeal was likely. United States v. Miskinis, 966 F.2d 1263, 1268 (9th Cir. 1992). In summary, to obtain habeas corpus relief on the basis of an alleged conflict a defendant must show that (1) counsel actively represented conflicting interests (an actual conflict), and (2) the actual conflict of interest adversely affected his lawyer's performance. Bonin, 59 F.3d at 825.

Petitioner alleges that an actual conflict of interest survived his trial because if he won a new trial from his third PCR, former Public Defender employees Mary Wisdom, Anita Rosenthal and Norma Shaw would be called to testify to impeach certain witnesses who allegedly changed their testimony. (R.O.A. 355(d).) Petitioner alleges that this demonstrates that an actual conflict still existed at the time appellate counsel Edward McGee was appointed. (Id. 355(e).) The Court disagrees.

Petitioner has neither demonstrated that an actual conflict of interest prevented appellate counsel from zealously representing his client nor has he demonstrated that an actual conflict of interest adversely affected his performance. In citing what may happen if he wins a new trial, Petitioner is only alleging a potential conflict of interest.

"In the absence of an "actual" conflict which squarely places the interests of the client in opposition to those of the attorney, and is likely

to compromise a reasonable attorney's ability to comply with his legal and ethical obligation to represent his client with undivided loyalty, the Cuyler standard cannot be met." Bonin v. Calderon, 59 F.3d 815, 827 (9th Cir. 1995), cert. denied, 516 U.S. 1051 (1996). If a mere "potential" or "theoretical" conflict does affect an attorney's representation in a particular case, a petitioner is not without recourse. Id. However, a petitioner cannot rely on Cuyler and obtain relief merely upon a showing of "adverse effect," but must instead make the showing required by Strickland v. Washington, 466 U.S. 668, 692-94 (1984), that counsel's performance was objectively unreasonable and that he suffered prejudice as a result. Id.; see also Paradis v. Arave, 130 F.3d 385, 391 (9th Cir. 1997).

Petitioner failed to even attempt to allege how appellate counsel was ineffective or what prejudice he suffered. (R.O.A. 358.) Therefore, Petitioner can establish neither deficient performance nor prejudice. Consequently, the potential conflict of interest claim is not established and Petitioner is not entitled to relief on this claim.

Claim 15: Petitioner Was Denied the Effective Assistance of Counsel by His Counsel's Failure to Argue that Petitioner's Confession to Dr. O'Connor Was Involuntary.

Claim 16: Petitioner Was Denied the Effective Assistance of Counsel by His Counsel's Failure to Argue that Petitioner's Statements to Dr. O'Connor Were Made in Violation of Miranda v. Arizona.

Claim 18: Petitioner Was Denied the Effective Assistance of Counsel by His Counsel's Failure to Place Petitioner's Group Psychiatry Contract Into Evidence.

To prevail on a claim of ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). The performance inquiry is whether counsel's assistance was reasonable considering all the

circumstances. Id. at 688-89. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id.

A petitioner must affirmatively prove prejudice. Id. at 693. The petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. The assessment of prejudice should proceed on the assumption that the decision-maker is reasonably, conscientiously, and impartially applying the standards that govern the decision. Id. at 695.[12]

A court need not address both components of the inquiry, or follow any particular order. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, without evaluating counsel's performance, that should be done. Id. at 697.

Claim 15

In the foregoing discussion of claim 1(B), supra at page 16 to 33, the Court concluded that Petitioner's confession was not involuntary. Consequently, Petitioner cannot demonstrate prejudice for this ineffective assistance of counsel claim.

Claim 16

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12. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence, . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695.

In the foregoing discussion of Claim 1(A), supra at page 4 to 16, the Court concluded that Petitioner's confession was not obtained in violation of Miranda. Consequently, Petitioner cannot demonstrate prejudice for this ineffective assistance of counsel claim.

Claim 18

The Court also concluded that Petitioner's confession was not involuntarily induced by the State's limited promise of confidentiality. See, supra at page 18 to 31. Therefore, as to claim 18, Petitioner was not prejudiced by trial counsel's failure to place the Group Psychiatry Contract into evidence.

Claim 20: Petitioner's Counsel Rendered Ineffective Assistance of Counsel for Failure to Pursue Alleged Juror Misconduct.

Petitioner alleges that his trial counsel rendered deficient performance in failing to pursue juror misconduct allegations. Petitioner further contends that trial counsel's failure to pursue the matter resulted in actual prejudice. Finally, Petitioner requests an evidentiary hearing based upon his allegations of juror bias. (File doc. 48 at 109-12.)

During Petitioner's second trial, trial counsel raised allegations that Juror Fred Raggett had improperly communicated with third parties concerning trial matters. The trial court conducted an in-chambers review of the matter and interviewed the juror. (R.T. 6/5/85 at 6-7.) The juror denied engaging in any improper communication with third persons. Id. In response, trial counsel asked for a hearing. Rather than immediately grant such a hearing, the court took the intermediate step of requesting that trial counsel file affidavits that demonstrated such third-party communication. Id. Trial counsel did not submit any affidavits demonstrating third-party communication. After Petitioner's conviction, trial counsel orally moved for a mistrial on the basis of Juror Fred Raggett's alleged communication with third persons about the trial. The trial court denied the motion. (R.T. 6/20/85 at 12-14; M.E. 6/20/85.) Subsequently, trial counsel moved for a new trial, in

part, based upon allegations that Juror Fred Raggett communicated with third persons to the effect that he was going to "get Beaty." (R.O.A. 323.) Trial counsel again indicated that he was in the process of obtaining affidavits to substantiate the allegations. Id. The motion for new trial was denied. (M.E. 7/18/85.) Trial counsel never submitted any affidavits to the court substantiating the allegations of juror misconduct. Beaty, 158 Ariz. at 250, 762 P.2d at 537.

In Smith v. Phillips, 455 U.S. 209, 215 (1982), the Supreme Court held that the remedy for allegations of juror bias is a hearing at which the defendant has the opportunity to prove actual bias. The trial court conducted an in-chambers inquiry into the allegations of juror misconduct. (R.T. 6/5/85 at 6-7.) The inquiry conducted by the trial court comported with the requirements of Petitioner's Fifth Amendment due process rights and his Sixth Amendment right to an impartial jury. See United States v. Soulard, 730 F.2d 1292, 1305-06 (9th Cir. 1984). The trial court interviewed the juror and determined that there was insufficient evidence of juror bias unless Petitioner brought forward new evidence. Juror bias determinations are findings of historical fact, entitled to a presumption of correctness. Tinsley v. Borg, 895 F.2d 520, 525 (9th Cir. 1990) (stating that findings of juror impartiality are entitled to special deference), cert. denied, 498 U.S. 1091 (1991).

Petitioner claims that the lack of follow-up by trial counsel was deficient representation and asks the Court to either order an evidentiary hearing or presume actual bias and therefore, prejudice.

Strickland requires that Petitioner affirmatively prove prejudice. 466 U.S. at 694. At the June 5, 1985, in-chambers inquiry, trial counsel stated that Petitioner's court-appointed investigator was familiar, first-hand, with the reports of juror misconduct. (R.T. 6/5/85 at 4.) On federal habeas, in Petitioner's Response to Respondents' Motion for Summary Judgment, Petitioner has attached the affidavit of Petitioner's state court-appointed investigator, Mary Durand. (File doc. 48, Exhibit C). However, Durand neither demonstrates nor attempts to demonstrate that prejudicial juror misconduct existed in this case. Absent prejudice, the Court's Strickland inquiry is at an end; it need not determine

whether trial counsel rendered deficient performance. Strickland, 466 U.S. at 697.

Finally, Petitioner's request for an evidentiary hearing is denied. A habeas petitioner is entitled to an evidentiary hearing on a claim where the facts are disputed if two conditions are met: (1) the petitioner's allegations would, if proved, constitute a colorable claim entitling him to relief; and (2) the state court trier of fact has not, after a full and fair hearing, reliably found the relevant facts. Correll v. Stewart, 137 F.3d 1404, 1411 (9th Cir. 1997). As previously indicated, Petitioner has failed to properly allege Strickland prejudice. Therefore, a colorable ineffective assistance of counsel claim is not present for this claim.

Claim 28: The Arizona Courts Erred in Denying Petitioner Relief Regarding the Trial Court's Admission of Phosphoglucomutase ("PGM") Results.[13]

Petitioner submits that the trial court violated his due process rights by admitting expert testimony and evidence of PGM analysis performed by the State. (File doc. 27 at 122-23.) While conceding exhaustion, Respondents contend that this claim is not cognizable on habeas because the issue only concerns a state court's evidentiary ruling. (File doc. 37 at 70-71.)

On federal habeas review, the Court may only consider whether Petitioner's conviction violated the Constitution, laws or treaties of the United States. Estelle v. McGuire, 502 U.S. 62, 67 (1991); Gerlaugh v. Stewart, 129 F.3d 1027, 1032 (9th Cir. 1997). A state court's evidentiary ruling may be grounds for relief only if it renders the state proceeding so fundamentally unfair as to violate due process. Estelle, 502 U.S. at 75; Bueno v. Hallahan, 988 F.2d 86, 87 (9th Cir. 1993).

Petitioner acknowledges that the State provided him with the blood sample that it used to produce test results, in the form of evidentiary

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13. PGM analysis, as it pertains to this case, involves the subject of blood typing and an enzyme found in the blood and semen known as phosphoglucomutase.

slides. Also, Petitioner does not deny that he then had the opportunity to utilize this blood sample and perform tests on it in the same fashion that the state did. (File doc. 48 at 117-18.) Petitioner only complains that the state should have retained its evidentiary slides so that they could be given to his expert for assessment and evaluation.

Petitioner's allegations do not even approach a violation of due process. Even if the State had destroyed the actual blood sample, this would not violate due process unless Petitioner could show bad faith on the part of the State. California v. Trombetta, 467 U.S. 479, 488 (1984); see also Mitchell v. Goldsmith, 878 F.2d 319, 322 (9th Cir. 1989) (stating that the failure of a state to preserve evidence of which no more can be said than it could have been subjected to tests, the results of which might have exonerated the defendant, is not a denial of due process unless a criminal defendant can show bad faith). Here, the State did not destroy the blood samples; Petitioner's allegations are without merit.

Claim 29: Unconstitutional Victim Impact Information Was Admitted at Petitioner's Sentencing.

Petitioner alleges that the trial court unconstitutionally considered victim impact testimony prior to imposing sentence in violation of Booth v. Maryland, 482 U.S. 496 (1987), overruled in part by, Payne v. Tennessee, 501 U.S. 808 (1991).

The Court has reviewed the applicable portions of the state court record and such record includes letters from the victim's family and concerned citizens. The vast majority of these letters recommended that Petitioner be sentenced to death.

In Payne v. Tennessee, 501 U.S. at 831, the United States Supreme Court revisited Booth and overruled it, in part. In Payne, the Court held that the Eighth Amendment does not erect a per se barrier to the admission of victim impact evidence. Id. (O'Connor, J., concurring). In response to the concerns of Booth, the Payne Court held that "if in a particular case, a witness' testimony or a prosecutor's remark so

infects the sentencing proceeding as to render it fundamentally unfair, the [petitioner] may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment." Id.

In the present case, the Court finds that the victim impact evidence presented did not so infect Petitioner's sentencing proceeding as to render it fundamentally unfair under the Fourteenth Amendment. In Arizona, the trial judge, rather than a jury determines the penalty in a capital case. A.R.S. § 13-703. A judge trained in the law is presumed to separate the admissible from the inadmissible and focus on the relevant sentencing factors and set aside the irrelevant. See, e.g., Gretzler v. Stewart, 112 F.3d 992, 1009 (9th Cir. 1997) (stating the presumption that the trial judge properly applied the law and considered only the evidence he knew to be admissible); Jeffers v. Lewis, 38 F.3d 411, 415 (9th Cir. 1994) (same). Petitioner has not rebutted this presumption and has not demonstrated that his sentencing hearing was fundamentally unfair in violation of due process.[14]

Claim 30: The Court Erred in Imposing Consecutive Sentences Because the Crimes Were Committed in a Single "Spree."

In his Petition, Petitioner complains that consecutive sentences were improperly imposed in violation of state statutes. (File doc. 27 at 126-27.)

A state supreme court must be recognized as the ultimate expositor of its own state law. Oxborrow v. Eikenberry, 877 F.2d 1395, 1399 (9th Cir.), cert. denied, 493 U.S. 942 (1989) (citing Mullaney v. Wilbur, 421 U.S. 684 (1975)). Absent constitutional error, the federal habeas court does not sit as a state supreme court of errors regarding state law issues. Estelle v. McGuire, 502 U.S. 62, 67 (1991); Jammal v. Van De Kamp, 926 F.2d 918 (9th Cir. 1991). Deference to the state supreme court is suspended only upon finding that the court's interpretation of

14. In fact, Petitioner has not even attempted to rebut the presumption that the trial judge only considered the relevant evidence and set aside the irrelevant at the sentencing proceeding.

its own statute is untenable or amounts to a subterfuge to avoid federal review of a constitutional violation. Oxborrow, 877 F.2d at 1399.

Petitioner does not raise any due process argument about the hearing wherein his sentence was imposed. Rather, Petitioner only complains about the length of his sentence. (File doc. 27 at 126-27.) On direct review the Arizona Supreme Court considered the argument that Petitioner's consecutive sentences was double punishment. Beaty, 158 Ariz. at 245, 762 P.2d at 532. The court held that the evidence supports separate convictions and therefore there was no double jeopardy violation. Id.; see also Missouri v. Hunter, 459 U.S. 359, 366 (1983) (stating that the Double Jeopardy Clause protects against multiple punishments for the same offense). Our review supports that there was no double jeopardy violation. Thus, the trial judge's order of consecutive sentences is neither untenable nor does it amount to a subterfuge to avoid federal review of a constitutional violation. Petitioner's claim is rejected.

Claim 31: The Trial Court's Failure to Find an Aggravating Circumstance Beyond a Reasonable Doubt Violates Petitioner's Statutory and Constitutional Rights.

Petitioner argues that the trial court was constitutionally required to state on the record at sentencing that the aggravating circumstances were found beyond a reasonable doubt. (File doc. 27 at 127-28.) Arizona law requires that aggravating circumstances be found beyond a reasonable doubt, State v. Jordan, 126 Ariz. 283, 286, 614 P.2d 825, 828, cert. denied, 449 U.S. 986 (1980), but it does not require the sentencing judge to so state on the record that it found the aggravating circumstances beyond a reasonable doubt. A.R.S. § 13-703(D). In the present case, the Arizona Supreme Court explained:

> The trial judge, however, is not required to state on the record that he or she found the factors beyond a reasonable doubt any more than a jury must state that they found the defendant guilty beyond a reasonable doubt. As long as a jury is properly

instructed, we can assume they applied the proper burden of proof. We can also assume the judge applied the proper burden.

Beaty, 158 Ariz. at 246, 762 P.2d at 533. Additionally, the Arizona Supreme Court reiterated that if it found that the existence of aggravating circumstances was inconclusive, it would reduce the death penalty to life imprisonment. Id. The Arizona Supreme Court conducted its own independent review of this issue and found that Petitioner's sentence was appropriately imposed under state law.

The merits of this claim have been considered by the Ninth Circuit on previous occasions. Woratzeck v. Stewart, 97 F.3d 329, 335-36 (9th Cir. 1996); Clark v. Ricketts, 958 F.2d 851, 860 n.6 (9th Cir. 1991). The Arizona Supreme Court and trial court are entitled to a presumption that they properly applied state law and found the existence of aggravating circumstances beyond a reasonable doubt. See id.[15] Petitioner claim is rejected.

Claim 32: The Cruel, Heinous, or Depraved Aggravating Circumstance is Unconstitutional as Applied to the Facts in Petitioner's Case.

Petitioner alleges that the state courts unconstitutionally applied the aggravating circumstance of A.R.S. § 13-703(F)(6), whether the murder was committed in a especially cruel, heinous or depraved manner, to the facts of his case. Petitioner contends that there is insufficient evidence to support the finding of the aggravating circumstance in his case.

Whether a state court correctly applied an aggravating factor to the facts is a question of state law. Lewis v. Jeffers, 497 U.S. 764, 780 (1990). Therefore, federal habeas review is limited to determining whether the state court's finding was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation.

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15. The Ninth Circuit further concluded that it need not decide whether federal law requires aggravating circumstances to be proven beyond a reasonable doubt since in any event the standard had been met in the state court. Woratzeck, Clark.

Id. A state court's finding of an aggravating factor is arbitrary or capricious if and only if no reasonable sentencer could have so concluded. Id. at 783. The "rational factfinder" standard is used to determine whether there is sufficient evidence to support a state court's finding of an aggravating factor. Jeffers, 497 U.S. at 781-83. Thus, the question is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact" could have made the finding beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). A habeas court faced with a record of historical facts which supports conflicting inferences must presume (even if it does not appear in the record) that the trier of fact resolved any such conflicts in favor of the prosecution. Id. at 326.

The aggravating circumstance, whether the murder was committed in an especially cruel, heinous or depraved manner, may be established by either a finding of cruelty or a finding that the murder is evidenced by heinousness and depravity. Cruelty is established when the victim consciously suffers physical pain or emotional distress. Beaty, 158 Ariz. at 242, 762 P.2d at 529; State v. Bible, 175 Ariz. 549, 604, 858 P.2d 1152, 1207 (1993), cert. denied, 511 U.S. 1046 (1994) (stating that the pain or distress may be mental or physical). In the present case, a reasonable factfinder could have found that especial cruelty was established by the following:

> Surely, the process of holding the victim against her will, clamping a hand over her mouth to muffle her screams, thus causing her to vomit reflects the terror and horror that must have been present in the victim's mind.

Beaty, 158 Ariz. at 242, 762 P.2d at 529. Petitioner's confession to Dr. O'Connor supports the fact that Petitioner put his hand over the victim's face to silence her. (R.T. 6/10/85 at 46.) Dr. Heinz Karnitschnig, Chief Maricopa County Medical Examiner, testified that the victim was smothered, that during this process she vomited, and that this process could have lasted up to five minutes. (R.T. 5/23/85 at 3, 10, 19-20, 28, 48, 54.) The fact that the victim experienced horror and terror during this five minute period is a reasonable inference any

rational factfinder would be entitled to draw. Contrary to Petitioner's contention, the record supports the existence of cruelty.

The Arizona Supreme Court also found the existence of heinousness and depravity. The terms heinous and depraved focus upon a defendant's state of mind at the time of the murder, as reflected by his words or his actions. Beaty, 158 Ariz. at 242, 762 P.2d at 529. The Arizona Supreme Court evaluates five factors to determine whether a defendant's state of mind was heinous or depraved at the time of the murder:

1. Relishing of the murder by the defendant;
2. The infliction of gratuitous violence upon the victim;
3. Mutilation of the victim's body;
4. The senselessness of the crime; and
5. The helplessness of the victim.

Id. at 242-43, 762 P.2d at 529-30. In applying these factors to Petitioner, the Arizona Supreme Court found support in the record for a finding of senselessness and helplessness based upon the young age of the victim (thirteen years old)[16] and the sexual assault of the victim which occurred contemporaneously with or shortly after the murder. Id. at 243, 762 P.2d at 530.

A review of the record supports that a reasonable factfinder could conclude that the murders were committed in a heinous and depraved manner. A murder is senseless when it is unnecessary for the defendant to achieve his or her criminal goal. State v. McCall, 139 Ariz. 147, 162, 677 P.2d 920, 935 (1983). The record of evidence supports a reasonable finding of helplessness and senselessness. The victim, barely thirteen, was 5'1" and only weighed 90 pounds. (R.T. 5/23/85 at 7.) The Presentence Report lists Petitioner as 6'1" and 209 pounds. (R.O.A. 334). Based upon these facts, the victim was helpless in this

16. In 1985, Arizona amended its list of aggravating circumstances to include the type of murder which occurred here, an adult murdering a child under the age of fifteen.

confrontation with Petitioner. As to senselessness, Petitioner could have accomplished whatever criminal goals he desired without killing the victim. Instead, he smothered and killed the young victim. In these circumstances, a finding of depravity is not arbitrary and capricious.

The record also shows that Petitioner contemporaneously sexually assaulted the victim at the time of the murder. The medical examiner, who performed the autopsy, testified that the victim was sexually assaulted. (R.T. 5/23/85 at 23.) Further, the medical examiner testified that the lack of injury to the victim's vaginal area is consistent with the victim being terrified at the time of the assault. (Id. at 23, 41-43.)

Despite this evidence supporting the aggravating circumstance, Petitioner contends that A.R.S. § 13-706(F)(6) is not satisfied because in Petitioner's confession to Dr. O'Connor, he told Dr. O'Connor that he did not mean to kill the victim. (File doc. 27 at 130.) As earlier indicated, the question is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact" could have made the finding beyond a reasonable doubt. Jackson, 443 U.S. at 319. The evidence established that it could have taken as long as five minutes to suffocate the victim. (R.T. 5/23/85 at 28.) Any rational factfinder could have rejected Petitioner's claim of lack of intent to kill finding that suffocating a victim for five minutes is not accidental. (See R.T. 6/19/85 at 7-8.) Further, by his own statement, he indicated that he intended to silence the victim as she had become rather loud in her attempt to get her mother's attention. (R.T. 6/10/85 at 46.) Petitioner's claim of insufficient evidence must be rejected.

## PROCEDURALLY BARRED CLAIMS

Before a federal court may review a petitioner's claims on the merits, the petitioner must have presented in state court every claim raised in the federal habeas petition. This is referred to as the "exhaustion requirement." Coleman v. Thompson, 501 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 520 (1982). To properly exhaust state remedies, the petitioner must "fairly present" his claims to the state's highest court in a procedurally appropriate manner. O'Sullivan

v. Boerckel, 119 S. Ct. 1728, 1730 (1999); Castille v. Peoples, 489 U.S. 346, 351 (1989).

A claim is fairly presented if the petitioner has described the operative facts and the substance of his federal habeas claim. Anderson v. Harless, 459 U.S. 4, 6 (1982); Picard v. Connor, 404 U.S. 270, 277-78 (1971).[17] In state court, the petitioner must describe not only the operative facts but also the asserted constitutional principle. The United States Supreme Court stated:

> If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution. If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.

Duncan v. Henry, 513 U.S. 364, 365-66 (1995). Similarly, a claim may be considered unexhausted if it includes new factual allegations which were not presented to the state court. New factual allegations render a claim unexhausted when they fundamentally alter the legal claim already considered by the state court. Vasquez v. Hillery, 474 U.S. 254, 260 (1986). Federal-state comity favors the principle that federal courts should not "entertain new evidence that places [a] claim in a significantly different posture, when that evidence was never presented to the state courts." Nevius v. Sumner, 852 F.2d 463, 470 (9th Cir. 1988).

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17. Resolving whether a petitioner has fairly presented his claim to the state court, thus permitting federal review, is an intrinsically federal issue which must be determined by the federal court. Wyldes v. Hundley, 69 F.3d 247, 251 (8th Cir. 1995), cert. denied, 116 S. Ct. 1578 (1996); Harris v. Champion, 15 F.3d 1538, 1556 (10th Cir. 1994).

If there are claims which have not been raised previously in state court, the federal court must determine whether the petitioner has state court remedies currently available to him. If there are none, the claims are "technically" exhausted. Jackson v. Cupp, 693 F.2d 867, 869 (9th Cir. 1982) (citing Engle v. Isaac, 456 U.S. 107, 125 n.28 (1982)). However, before the Court may review a technically exhausted claim on the merits, the petitioner must demonstrate legitimate cause and actual prejudice to excuse his failure to raise the claims in state court, or show that a fundamental miscarriage of justice would result. Similarly, if a claim was raised in state court but found precluded or waived, the Court may not hear the claim absent a showing of cause and prejudice or fundamental miscarriage of justice. Sawyer v. Whitley, 505 U.S. 333, 338 (1992); Coleman, 501 U.S. at 735 n.1; Engle, 456 U.S. at 129.

Ordinarily "cause" to excuse a default exists if a petitioner can demonstrate that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Coleman, 501 U.S. at 753. Objective factors which constitute cause include interference by officials which makes compliance with the state's procedural rule impracticable, a showing that the factual or legal basis for a claim was not reasonably available to counsel, and constitutionally ineffective assistance of counsel. Murray v. Carrier, 477 U.S. 478, 488 (1986).

"Prejudice" is actual harm resulting from the alleged constitutional error. Id. at 494. If a petitioner cannot meet the cause and prejudice standard, the federal court still may hear the merits of procedurally barred claims if the failure to hear the claims would constitute a "miscarriage of justice." Sawyer v. Whitley, 505 U.S. at 339.

The fundamental miscarriage of justice exception is also known as the "actual innocence" exception. There are two types of claims recognized under this exception: 1) that a petitioner is "innocent of the death sentence," or, in other words, that the death sentence was erroneously imposed; and 2) that a petitioner is actually innocent of the capital crime. In the first instance, the petitioner must show by clear

and convincing evidence that, but for a constitutional error, no reasonable juror would have found the existence of an aggravating circumstance or some other condition of eligibility for the death sentence under the applicable state law. Id. at 336, 345. Claims regarding errors in the submission of mitigation evidence do not relate to a "condition of eligibility" and cannot form a basis for relief under this exception. Id. at 345-47.

Claims of actual innocence of the crime itself are judged under a different standard. The petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup v. Delo, 513 U.S. 298, 327 (1995). To establish the requisite probability, the "petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." Id.[18]

Regarding the procedural status of the claims presented in the Amended Petition, Respondents assert that the following claims were procedurally defaulted in state court: 1 (in part), 2, 3, 5 through 14, 17, 19, and 21 through 27. Respondents also assert that this Court should not excuse the procedural default because Petitioner cannot show legitimate cause and actual prejudice or a fundamental miscarriage of justice.

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18. Substantive (or "free-standing") claims of actual innocence must be distinguished from procedural claims. See Schlup, 513 U.S. at 313-16. In Herrera v. Collins, 506 U.S. 390 (1993), the petitioner advanced his claim of innocence to support a novel substantive constitutional claim that the execution of an innocent person would violate the Eighth Amendment even if the proceedings that had resulted in his conviction and sentence were entirely fair and error-free. In that case an extraordinarily high standard of review was applied. Id. at 417-19. In contrast, in Schlup the petitioner accompanied his innocence claim with an assertion of constitutional errors at trial (ineffective assistance of counsel and withholding of evidence). In such a case, if a petitioner "presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims." Schlup, 513 U.S. at 316.

Petitioner argues that even if some issues were defaulted in state court, they are not procedurally barred in federal court because his direct appeal was mandatory and the Arizona Supreme Court was required to review his entire record for fundamental error. Therefore, Petitioner argues, the review for fundamental error exhausted the issues in state court and he does not need to show cause and prejudice. (File doc. 48 at 11.)

The Court does not agree. The Ninth Circuit has addressed the issue of Arizona's fundamental error review in the context of procedural default and stated:

> Poland next argues that the "fundamental error" review of the Arizona Supreme Court constitutes a fair presentation of an issue to that court, even if not argued by the parties nor mentioned in the court's opinion. This contention was considered and specifically rejected in Martinez-Villareal v. Lewis, 80 F.3d 1301, 1306 (9th Cir. 1996), cert. denied, ___ U.S. ___, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996). See also Krone v. Hotham, 181 Ariz. 364, 890 P.2d 1149, 1151 (Ariz. 1995) (usual rules of preclusion apply in capital cases); State v. Curtis, 185 Ariz. 112, 912 P.2d 1341 (Ariz. Ct. App. 1995) (review for fundamental error of issues not raised on appeal does not enable petitioner to raise issue belatedly in post-conviction proceeding).

Poland v. Stewart, 117 F.3d 1094, 1105 (9th Cir. 1997). The Court recognizes and follows Martinez-Villareal and Poland, which are controlling Ninth Circuit precedent on this issue.

Furthermore, in Woratzeck v. Lewis, 863 F. Supp. 1079, 1095 (D. Ariz. 1994), aff'd, 97 F.3d 329 (9th Cir. 1996), the court rejected a petitioner's argument that Arizona's automatic direct appeal and search of the record for fundamental error obviates the possibility that a federal constitutional claim is defaulted. The Woratzeck court also rejected the petitioner's argument that Arizona defines fundamental error as federal constitutional error. Id. Like Petitioner here, the petitioner in

Woratzeck and Poland relied on Beam v. Paskett, 3 F.3d 1301 (9th Cir. 1993), cert. denied, 511 U.S. 1060 (1994). However, in Beam the Ninth Circuit held:

> Idaho law establishes a mandatory review system in which the state supreme court is required to examine the record on its own initiative in order to determine whether certain specified types of errors occurred during sentencing . . . . Because the reviewing court has statutory notice of the types of errors for which it is required to examine the record, it is presumed that it has carried out its statutory obligations even when it does not expressly indicate in its opinion that it has done so. As a result, the court's affirmance of the defendant's sentence after mandatory review constitutes at least an implicit rejection of claims of error that fall within its obligatory review even if the defendant has not raised those claims with specificity. Other states have adopted mandatory review systems that differ in significant respects from Idaho's.[3]
>
> [Footnote 3:] For example, some other states have adopted procedures that may be better described as "automatic appeal" requirements rather than mandatory review ones . . . . [T]he content of the appeal does not appear to be prescribed by statute, and affirmance by the court does not appear to require rejection of any particular claims on the merits. A procedural default arising from a failure to present a claim pursuant to this type of appellate process would raise different issues than are presented here.

Beam, 3 F.3d at 1306 (emphasis added) (citation omitted). In Woratzeck, the court held that Arizona is one of those other states that have review systems significantly different from Idaho's. 863 F. Supp. at 1095. Arizona's statute does not prescribe the content of the appeal and affirmance by an Arizona appellate court does not require rejection

of any particular claim on the merits.[19] The Woratzeck court noted that, brought to its logical conclusion, the petitioner's arguments "would eliminate the utility of Arizona's procedural rules and virtually eradicate the doctrine of procedural default in Arizona." 863 F. Supp. at 1095.

For the reasons stated below, the Court finds that the following claims are procedurally barred and cannot be considered on the merits: 1(B) (3), 3, 6, 7 through 14, 17, 19, and 21 through 27.

Claim 1(B)(3): Petitioner's Confession was Involuntary in Violation of the Sixth Amendment Because Petitioner Had to Participate in the Group Therapy Sessions or be Transferred Back to the Main Jail.

Respondents argue that this claim was not fairly presented and exhausted in state court. The Court agrees. Petitioner alleges that the substance of this forced participation claim was contained in his due process/involuntariness argument presented to the state supreme court. (File doc. 48 at 35, citing Amended Opening Brief at 13.)

The record belies Petitioner's assertion. In his opening brief to the state supreme court, Petitioner based his involuntariness claim exclusively on the facts supporting his claim that a promise of confidentiality induced his confession. (Amended Opening Brief at

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19. Arizona's statute, which pertains to appeals in general, simply stated that "[u]pon appeal taken by a defendant from the judgment, the supreme court shall review the entire record." Ariz. Rev. Stat. § 13-4035 (repealed 1995). In contrast, Idaho has a statute specifically titled "Review of death sentences" which states: "With regard to the sentence the court shall determine: (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and (2) Whether the evidence supports the judge's finding of a statutory aggravating circumstance from among those enumerated in section 19-2515, Idaho Code, and (3) Whether the sentence of death is excessive." Idaho Code § 19-2827(c). See also Poland, 117 F.3d at 1105-6 (stating that the petitioner's reliance on Beam was misplaced because the Idaho statute at issue there differs significantly from Arizona's).

13.) Nevertheless, Petitioner argues that his opening brief cited R.T. 5/31/85 at 30-35 and therefore the forced participation facts were fairly presented. However, those pages of the record do not contain facts about forced participation. They contain facts about Petitioner being transferred to the Durango facility, in part, because of the harassment he was receiving at the main jail. (R.T. 5/31/85 at 30-35.) These facts do not present the claim that Petitioner's confession was involuntary because he was forced to participate in group therapy sessions or be returned to the main jail.

Although Petitioner did fairly present certain facts in support of his claim that his confession was involuntary, this does not mean that all other factual allegations for a claim of involuntary confession were also fairly presented to the state court. See Carriger v. Lewis, 971 F.2d 329, 333 (9th Cir. 1992) (en banc) (stating that the Petitioner's exhaustion as to one factual claim of ineffectiveness of counsel does not mean that all other factual variations of ineffectiveness are likewise exhausted), cert. denied, 507 U.S. 992 (1993). "A claim may be considered unexhausted if it includes new factual allegations which were not presented to the state courts." Chacon v. Wood, 36 F.3d 1459, 1468 (9th Cir. 1994). To fairly present and exhaust a claim, the operative facts giving rise to the asserted constitutional principle must be fairly presented to the state court. Id. Federal-state comity favors the principle that federal courts should not entertain new factual allegations that places a claim in a significantly different posture, when those factual allegations were never presented to the state courts. See Nevius v. Sumner, 852 F.2d at 470. Petitioner did not argue the substance of this subpart in state court. It does place the claim in a significantly different posture; therefore, he did not fairly present and exhaust the claim in state court.

Petitioner's failure to present this claim to the state court is a procedural default. See Coleman, 501 U.S. at 735 n.1; Coley v. Gonzalez, 55 F.3d 1385, 1387 (9th Cir. 1995). Claims not fairly presented in state court are technically exhausted if the Court determines that the Petitioner no longer has any state court remedies available to him. The Court finds that Petitioner has no state court

remedies remaining for Claim 1(B)(3) and that the state court would find the claim procedurally defaulted pursuant to Rule 32.2(a)(3), Ariz.R.Crim.P.

Petitioner has not established legitimate cause and actual prejudice, or a fundamental miscarriage of justice, which would overcome the procedural default. Petitioner argues only that he "does not need to show cause and prejudice." (File doc. 48 at 11.) That argument has already been addressed and rejected by the Court. (See discussion supra at page 59 to 61.) Claim 1(B)(3) is procedurally barred.

Claim 3: The Admission of Petitioner's Statement Violated Due Process and Privacy Rights to Confidentiality in His Physician-Patient Communication.

For his habeas Claim 3, Petitioner claims that the admission of his confession violated his right to confidential communications under the Due Process Clause, that the State created a liberty interest in the confidentiality of his communications with Dr. O'Connor, and that he had a constitutional right to privacy concerning his confidential communications. (File doc. 27 at 57-61.)

Respondents argue that this claim was not fairly presented to the state court. The Court agrees. Petitioner did not make these constitutional arguments in his Opening Brief and Amended Opening Brief in state court. The sole argument regarding confidential communications was that Petitioner's confession was covered by Arizona's physician-patient privilege, A.R.S. § 13-4062. In its answer, the State, inter alia, argued that the privilege is abrogated by A.R.S. § 13-3620 in specific situations involving child abuse. In his Reply Brief, Petitioner argued:

> As a final observation on the subject of physician-patient privilege, Beaty would note that the arguments set forth by the State would, if carried to their logical extreme, present tremendous due process problems, particularly for child molester defendants incompetent to stand trial. In these cases,

in the absence of physician-patient privilege, no lawyer could have [his] client's competence or sanity evaluated under the provisions of Rule 11 of the Arizona Rules of Criminal Procedure without exposing his client to the risk that all statements made to the examining physician would be required to be reported to the prosecution. This interpretation of A.R.S. Section 13-3620 is contrary to the provisions of Rule 11.7 of the Arizona Rules of Criminal Procedure and to the holding of the United States Supreme Court in Estelle v. Smith, supra, and Pate v. Robinson, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966). While Beaty's case clearly does not involve questions of confidence or an insanity defense, the broad abrogation of physician-patient privilege urged by the State would cause grave problems in this area.

(Reply Brief at 12-13.)

In his Reply Brief, Petitioner did not argue that his due process right to confidential communications was violated. Rather, Petitioner merely pointed out and cautioned that in future cases where a Rule 11 patient examination is at issue or where the incompetency of a defendant is at issue, a broad abrogation of the physician-patient privilege would raise due process concerns. Petitioner then conceded that the issues in his appeal do not concern an insanity defense or a Rule 11 breach of confidentiality. Thus, Petitioner's argument in state court is completely different from the argument Petitioner raises in habeas Claim 3. In Petitioner's habeas claim 3, Petitioner contends that his due process right to confidential communications was violated, that the state created a liberty interest in the confidentiality of his communications with Dr. O'Connor, and that he had a constitutional right to privacy concerning his confidential communications. Petitioner did not fairly present habeas Claim 3 in state court.

Petitioner's failure to present these claims to the state courts is a procedural default. See Coleman, 501 U.S. at 735 n.1. The Court finds that Petitioner has no state court remedies remaining for Claim 3 and that the state court would find this claim procedurally defaulted

pursuant to Rule 32.2(a)(3), Ariz.R.Crim.P. Petitioner has not established legitimate cause and actual prejudice, or a fundamental miscarriage of justice, which would excuse the procedural default. Petitioner argues only that he "does not need to show cause and prejudice." (File doc. 48 at 11.) That argument has already been addressed and rejected by the Court. (See discussion supra at page 59 to 61.) Claim 3 is procedurally barred.

Claim 6: Petitioner Was Denied Effective Assistance of Appellate Counsel.

Respondents contend that this claim was not presented in state court. The Court agrees. Petitioner alleges in his habeas petition that state appellate counsel was ineffective because he failed to argue that Petitioner's confession was involuntary because: (A) Petitioner was interrogated by other inmates in the group therapy sessions and (B) Petitioner was forced to participate in the group therapy sessions or be returned to the main jail. (File doc. 27 at 68-69.)

Petitioner, in his Response to Respondents' Motion for Summary Judgment, withdraws Claim 6, contingent upon the Court's ruling that the underlying claim which supports the claim of ineffective assistance of appellate counsel, was fairly presented and exhausted in state court. (File doc. 48 at 63-64.) The Court finds that the underlying claim which comprises Claim 6(A) was fairly presented and exhausted in state court. The underlying claim, that inmate coercion caused Petitioner's confession to become involuntary, is discussed on the merits. See Claim 1(B)(4), supra at page 32 to 33. Therefore, Petitioner has withdrawn Claim 6(A) from consideration by this Court.

However, the Court has concluded that the underlying claim which comprises claim 6(B) is procedurally barred. See supra at page 31 and page 62 to page 64. Because the Court finds claim 6(B) procedurally barred, the contingencies of Petitioner's offer to withdraw claim 6(B) have not been met. Therefore, the Court decides its procedural status as follows.

In his fourth PCR, Petitioner alleged that his appellate counsel was ineffective for failing to raise various issues. (Supplemental PCR Petition filed 2/28/92.) However, Petitioner did not allege that appellate counsel was ineffective because he failed to argue that Petitioner's confession was involuntary because Petitioner was forced to participate in the group therapy sessions or be returned to the main jail. Thus, this aspect of Claim 6 was never presented to the state court.

Petitioner's failure to present this claim to the state courts is a procedural default. See Coleman, 501 U.S. at 735 n.1. There are no state court remedies remaining for Claim 6 because the state court would find the claim procedurally defaulted pursuant to Rule 32.2(a)(3), Ariz.R.Crim.P. Petitioner has not established legitimate cause and actual prejudice, or a fundamental miscarriage of justice, which would excuse the procedural default. Petitioner argues only that he "does not need to show cause and prejudice." (File doc. 48 at 11.) That argument has already been addressed and rejected by the Court. (See discussion supra at page 59 to 61.) Claim 6(B) is procedurally barred.

Claim 7: Petitioner Was Denied Effective Assistance of Trial/Sentencing Counsel.

In Claim 7 Petitioner alleges in general terms that his counsel was ineffective for failing to call alibi witnesses at trial, present mitigating evidence at sentencing, and investigate and prepare adequately for trial and sentencing. (File doc. 27 at 23-24, 69-72.) Respondents contend that this generalized argument is not a separate claim and its substance is set forth in other habeas claims. The Court agrees. Claim 7 is a summary of Claims 8, 9, 10 and 12. For the same reasons those claims are procedurally barred, Claim 7 is procedurally barred. (See discussion infra.)

Claim 8: Petitioner Was Denied Effective Assistance of Counsel at the Sentencing Phase as His Counsel Failed to Present Mitigating Evidence and Witnesses.

In state court, in his first petition for post-conviction relief, Petitioner raised four claims of counsel's ineffectiveness at trial, but did not allege that counsel was ineffective at sentencing. (R.O.A. 338.) Subsequently, on May 16, 1991, Petitioner's counsel attempted to raise this claim in a Supplemental Petition to his third petition for post-conviction relief. Counsel had been appointed on January 17, 1991. (R.O.A. 139.) The trial court had allowed counsel an extension until May 10, 1991, to file a supplemental petition. (M.E. 4/10/91.) On or about May 7, counsel filed a motion for another extension, and on May 10, the trial court denied the motion. (R.O.A. 366; M.E. 5/10/91.) A few days later, on May 16, 1991, the trial court entered an order denying the original pro se third petition for post-conviction relief, and just before 5:00 p.m. that same day, counsel filed the Supplemental Petition. (M.E. 5/16/91; R.O.A. 370.) Subsequently, Counsel filed a motion asking the trial court to consider the Supplemental Petition, which motion was denied. (R.O.A. 371; M.E. 5/29/91.) On September 25, 1991, the Arizona Supreme Court summarily denied Petitioner's petition for review.

Respondents argue that Claim 8 was not fairly presented in state court and therefore it is not exhausted. (File doc. 37 at 35.) To properly exhaust state remedies, the petitioner must fairly present his claims in state court. Whether a petitioner has fairly presented his claim to the state court is an intrinsically federal issue which must be determined by the federal court. Wyldes v. Hundley, 69 F.3d 247, 251 (8th Cir. 1995). Fair presentation requires that each claim be presented in state court in a manner allowing the court to address the claim on the merits. See Castille v. Peoples, 489 U.S. 346, 351 (1989) (submitting a claim in a procedural context in which its merits will not be considered absent special circumstances does not constitute fair presentation); see also James v. Borg, 24 F.3d 20, 24 (9th Cir. 1994).

As the above factual background indicates, the state court provided Petitioner with the opportunity to supplement his third PCR petition by establishing a deadline of May 10, 1991. See Rule 32.6(d), Ariz.R.Crim.P. (1991). Petitioner sought to have the deadline extended; the state court refused. (R.O.A. 366; M.E. 5/10/91.) It was

within the discretion of the state court whether to extend the time for Petitioner to supplement his petition. On May 16, 1991, without permission, Petitioner filed an untimely supplement. Petitioner's subsequent motion for permission to file the untimely supplement was denied.[20] (R.O.A. 371; M.E. 5/29/91.) Under these circumstances, Petitioner did not present claim 8 in a manner which allowed the court to address it on the merits. See Castille v. Peoples, 489 U.S. at 351. The Court agrees with Respondents that Petitioner did not fairly present Claim 8 in his third PCR petition.

Petitioner's failure to fairly present Claim 8 in the third PCR petition is a procedural default. See Coleman, 501 U.S. at 735 n.1; Harris v. Reed, 489 U.S. at 269-70; Coley v. Gonzales, 55 F.3d 1385, 1387 (9th Cir. 1995). No state remedies remain available for this claim because the state courts would find the claim precluded in accordance with Rule 32.2(a)(3), Ariz.R.Crim.P.

Petitioner has not established legitimate cause and actual prejudice, or a fundamental miscarriage of justice, which would excuse the default. Petitioner argues only that he "does not need to show cause and prejudice." (File doc. 48 at 11.) The Court has already addressed this argument and rejected it. (See discussion supra at page 59 to 61.)

Next, Petitioner argues that he properly raised Claim 8, regarding counsel's ineffectiveness at sentencing, in his fourth PCR petition, which was filed on February 6, 1992. Petitioner filed a supplemental PCR petition on February 28, 1992. (Supplemental PCR Petition filed 2/28/92.) In ruling on the fourth PCR, the trial court held that the claims were precluded pursuant to Rule 32.2. (M.E. 12/2/92.) Subsequently, Petitioner did not file a petition for review with the Arizona Supreme Court.

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20. The Maricopa County Superior Court's exercise of its discretion not to allow the delayed filing of the supplemental petition is strictly a question of the proper application of state law not cognizable under 28 U.S.C. § 2254. Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985), cert. denied, 478 U.S. 1021 (1986).

The United States Supreme Court requires a petitioner to satisfy the exhaustion requirement. The exhaustion requirement is not satisfied unless a petitioner fairly presents his claim to the highest state court. See O'Sullivan v. Boerckel, 119 S. Ct. at 1730. Petitioner did not exhaust Claim 8 in his fourth PCR petition because he did not petition the Arizona Supreme Court for review.

Petitioner's failure to exhaust Claim 8 in the fourth PCR petition is a procedural default. See Coleman, 501 U.S. at 735 n.1; Coley, 55 F.3d at 1387. No state remedies remain available for this claim because the state courts would now find the claim precluded in accordance with Rule 32.2(a)(3), Ariz.R.Crim.P.

Petitioner has not established legitimate cause and actual prejudice, or a fundamental miscarriage of justice, which would excuse the default. Petitioner argues only that he "does not need to show cause and prejudice." (File doc. 48 at 11.) The Court has already addressed this argument and rejected it. (See discussion supra at page 59 to 61.) Therefore, Claim 8 is procedurally barred.

Claim 9: Petitioner Was Denied the Effective Assistance of Counsel by His Counsel's Failure to Conduct an Investigation to Ascertain the Extent of any Possible Mental Impairment.

Claim 11: Petitioner Was Denied the Effective Assistance of Counsel by His Counsel's Failure to Grant Access to the Presentence Report.

Claim 13: Petitioner Was Denied the Effective Assistance of Counsel as His Counsel Was Under Investigation for Using and Selling Drugs.

These claims were presented in state court in Petitioner's fourth PCR. (PCR Petition filed 2/6/92; Supplemental PCR Petition filed 2/28/92.) The trial court held that the claims were procedurally precluded pursuant to Rule 32.2, Ariz.R.Crim.P. (M.E. 12/2/92.)

Subsequently, Petitioner did not exhaust these claims by filing a petition for review with the Arizona Supreme Court.

Respondents argue that Claims 9, 11 and 13 were not fairly presented in state court and therefore they are not exhausted. (File doc. 37 at 37-38; 43; 45-46.) A petitioner has not satisfied the exhaustion requirement unless he has fairly presented his claim to the highest state court. See O'Sullivan v. Boerckel, 119 S. Ct. at 1730. Petitioner's failure to exhaust Claims 9, 11 and 13 in the fourth PCR petition is a procedural default. See Coleman, 501 U.S. at 735 n.1; Coley, 55 F.3d at 1387. No state remedies remain available for this claim because the state courts would now find the claim precluded in accordance with Rule 32.2(a)(3), Ariz.R.Crim.P.

Petitioner has not shown cause and prejudice, or a fundamental miscarriage of justice, to avoid the resulting procedural bar in the Court. The Court finds that Claims 9, 11 and 13 are procedurally barred.

Claim 10: Petitioner Was Denied the Effective Assistance of Counsel by His Counsel's Failure to Call Potential Alibi Witnesses.

Claim 14: Petitioner Was Denied the Effective Assistance of Counsel by Counsel's Failure to Object to Dr. O'Connor's Psychiatric Testimony.

Claim 17: Petitioner Was Denied the Effective Assistance of Counsel by His Counsel's Failure to Allow Petitioner to Testify Regarding Dr. O'Connor's Testimony.

Petitioner concedes that these claims were never presented in state court. (File doc. 48 at 80-82; 94-96; 99-100.) Respondents argue that the lack of presentation in state court renders these claims procedurally defaulted. (File doc. 37 at 41; 47-48; 52.) The Court agrees. To properly exhaust state remedies, the petitioner must fairly present his claims in state court. Petitioner's failure to present these claims is a procedural default. See Coleman, 501 U.S. at 735 n.1; Coley, 55 F.3d at 1387. There are no state court remedies remaining for these claims

because the state court would find them precluded pursuant to Rule 32.2(a)(3), Ariz.R.Crim.P. Petitioner has not established cause and prejudice, or a fundamental miscarriage of justice, to excuse the procedural defaults. Therefore, Claims 10, 14 and 17 are procedurally barred.

Claim 12: Petitioner Was Denied the Effective Assistance of Counsel by His Counsel's Failure to Investigate Issues Crucial to Petitioner's Defense.

Petitioner contends that he raised this claim in state court in his Supplemental Petition filed May 16, 1991. However, as discussed above, supra at page 68 to page 70, the trial court rejected that pleading as untimely. Thus, the claims raised there were not fairly presented in a procedurally appropriate manner. See supra page 69. Petitioner's failure to present claim 12 in the third PCR is a procedural default. See Coleman, 501 U.S. at 735 n.1; Coley, 55 F.3d at 1387. There are no state court remedies remaining for the claims because the state court would find them procedurally defaulted pursuant to Rule 32.2(a)(3).

Claim 12 was fairly presented in the fourth PCR petition. (4th PCR Petition filed 2/6/92; Supplemental PCR Petition filed 2/28/92.) However, the trial court held that the claim was procedurally precluded pursuant to Rule 32.2, Ariz.R.Crim.P. (M.E. 12/2/92.) Subsequently, Petitioner did not file a petition for review with the Arizona Supreme Court. A petitioner has not satisfied the exhaustion requirement unless he has fairly presented his claim to the highest state court. O'Sullivan, 119 S.Ct. at 1730. Petitioner's failure to exhaust Claims 12 in the fourth PCR petition is a procedural default. See Coleman, 501 U.S. at 735 n.1; Coley, 55 F.3d at 1387. There are no state court remedies remaining for the claims because the state court would find them procedurally defaulted pursuant to Rule 32.2(a)(3).

Petitioner has not shown cause and prejudice, or a fundamental miscarriage of justice, to avoid the resulting procedural bar in this Court. Claim 12 is procedurally barred.

Claim 19: Petitioner Was Denied the Effective Assistance of Counsel by His Counsel's Failure to Request a Jury Instruction Regarding Dr. O'Connor's Testimony.

In this habeas claim, Petitioner alleges that his trial counsel was ineffective because he "failed to request any [jury] instruction limiting the use of [Dr. O'Connor's] testimony." (File doc. 27 at 106.) Petitioner fails to elaborate further on what the instruction should have said. In state court, in his fourth petition for post-conviction relief, Petitioner claimed that his trial counsel was ineffective for failing to request a lesser-included-offense instruction based on Dr O'Connor's testimony that Petitioner "didn't mean to kill the Fornoff girl." (4th PCR Petition filed 2/6/92, at 5.)

Respondents argue that these are different claims and therefore habeas Claim 19 was not fairly presented to the state court. The Court agrees. The raising of one specific claim of ineffective assistance of counsel does not exhaust other specific claims of ineffective assistance of counsel. Carriger v. Lewis, 971 F.2d at 333. This specific claim of ineffective assistance of counsel was not presented to the state courts. Petitioner's failure to present this claim is a procedural default. See Coleman, 501 U.S. at 735 n.1; Coley, 55 F.3d at 1387. There are no state court remedies remaining for this claim because the state court would find it procedurally defaulted pursuant to Rule 32.2(a)(3).

Even assuming arguendo that Claim 19 was fairly presented in the fourth PCR petition, as Petitioner contends, the claim still would be procedurally barred in this Court. The trial court found the claims in the fourth petition to be procedurally defaulted. Subsequently, Petitioner did not file a petition for review with the Arizona Supreme Court. A petitioner has not satisfied the exhaustion requirement unless he has fairly presented his claim to the highest state court. O'Sullivan, 119 S.Ct. at 1730. Petitioner's failure to exhaust Claims 19 in the fourth PCR petition is a procedural default. See Coleman, 501 U.S. at 735 n.1; Coley, 55 F.3d at 1387. There are no state court remedies remaining for this claim because the state court would find it procedurally defaulted pursuant to Rule 32.2(a)(3), Ariz.R.Crim.P.

Either way, Petitioner had to show cause and prejudice or a fundamental miscarriage of justice to overcome the procedural default. He has failed to do so. Claim 19 is procedurally barred.

Claim 21: Arizona's Death Penalty Statute Fails to Provide Guidance to the Court.

Claim 22: The Arizona Supreme Court Does Not Conduct a Proper Proportionality Review.

Claim 23: The Death Penalty is a Cruel and Unusual Punishment.

Claim 24: The Arizona Death Penalty is Imposed Arbitrarily and Irrationally.

Claim 25: The Arizona Death Penalty Discriminates Against Poor Defendants, Young Defendants, and Male Defendants.

Claim 26: Application of the Death Penalty to the Facts of This Case Constitutes Cruel and Unusual Punishment.

For each of these claims, Petitioner argues that he "has fairly presented the substance of this federal claim to the state courts." (File doc. 48 at 112-16.) However, he fails to identify the proceedings and/or claims in which the substance of these claims were supposedly fairly presented to the state courts. Respondents contend that he did not fairly present these claims to the state courts and that these claims are procedurally defaulted. (File doc. 37, at 59, 62, 64-65, 67-68.)

The Court has reviewed the applicable portions of the state court record, specifically the direct appeal proceedings and his petitions for post-conviction relief, and finds that these claims were not fairly presented to the state courts. Petitioner's failure to present these claims to the state courts is a procedural default. See Coleman, 501 U.S. at 735 n.1. There are no state remedies which remain available to Petitioner. If Petitioner were to return to state court, the claims would be found precluded under Rule 32.2(a)(3), Ariz.R.Crim.P. Because

Petitioner has shown neither cause and prejudice nor a fundamental miscarriage of justice to overcome the procedural default, Claims 21 through 26 are procedurally barred.

Claim 27: Petitioner Was Entitled to a Jury Trial on the Factual Issues that are Aggravating Circumstances as a Matter of Equal Protection.

In his habeas Claim 27, Petitioner contends that under state court rule and the state constitution a non-capital defendant has a right to a jury trial on factual issues in sentencing, and that Petitioner's rights under the Equal Protection Clause of the Fourteenth Amendment were violated because he was not afforded a jury trial on aggravating circumstances. (File doc. 27 at 120.)

In state court, on direct appeal, Petitioner claimed that the Sixth Amendment entitled him to a jury trial on the propriety of the death sentence and the existence of mitigating and aggravating circumstances. (Amended Opening Brief at 47.) In his state court claim Petitioner did not mention the Fourteenth Amendment or equal protection. Neither did the Arizona Supreme Court in its opinion. Thus, Claim 27 was not fairly presented to the state court. See Duncan v. Henry, 513 U.S. at 365-66.

Petitioner's failure to present these claims to the state courts is a procedural default. See Coleman, 501 U.S. at 735 n.1. The Court finds that there are no remedies in state court for this claim and that the state court now would find the claim precluded under Rule 32.2(a)(3), Ariz.R.Crim.P. Petitioner has not shown cause and prejudice or a fundamental miscarriage of justice to overcome the procedural default. Therefore, Claim 27 is procedurally barred.

## CONCLUSION

The Court finds that the following claims are procedurally barred: 1(B)(3), 3, 6(B), 7 through 14, 17, 19, and 21 through 27. The Court

has considered each of the remaining claims on the merits and concludes that Petitioner is not entitled to habeas relief.

**Accordingly**,

**IT IS ORDERED** denying with prejudice Petitioner's Petition for Writ of Habeas Corpus and all amendments thereto. **[File doc. no. 1, 27].**

**IT IS FURTHER ORDERED** granting Respondents' Motion for Summary Judgment. **[File doc. no. 37].**

**IT IS FURTHER ORDERED** that Petitioner is not entitled to an evidentiary hearing on any of his submitted claims. Therefore, his requests for an evidentiary hearing are **DENIED. [File doc. nos. 50, 59]**

**IT IS FURTHER ORDERED** vacating the stay of execution previously entered by the Court. **[File doc. no. 4].**

**IT IS FURTHER ORDERED** that the Clerk of Court shall enter judgment in accordance with this Order and send copies of this Order to all counsel of record.

DATED this 24th day of November, 1999.

_____/s/_____
ROGER G. STRAND
United States District Judge